INSTITUTES
OF
NATURAL LAW

Being the ſubſtance of a

COURSE of LECTURES

ON

Grotius de Jure Belli et Pacis

READ IN S. JOHNS COLLEGE
CAMBRIDGE,

By T. RUTHERFORTH. D.D. F.R.S.
ARCHDEACON OF ESSEX,
AND CHAPLAIN TO HER ROYAL HIGHNESS
THE PRINCESS DOWAGER OF WALES.

VOLUME the SECOND

In which are explaned

The rights and obligations of mankind conſidered as members of civil ſocieties.

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The Reader is desired to correct the following errors.

PAG. 19. *lin.* 8. *for* it *read* them. *pag.* 28. *lin.* 29. *for* resolve *read* resolved. *pag.* 111. *lin.* 17. *for* having *read* that have. *pag.* 195. *lin.* 11. *for* sort *read* part. *pag.* 206. *lin.* 6. *for* and fight *read* and to fight. *pag.* 240. *lin.* 15. *for* pleased *read* please. *pag.* 252. *lin.* 7. *for* performances *read* performance. *pag.* 253. *lin.* 25. *for* will you *read* you will. *pag.* 260. *lin.* 33. *for* his *read* this. *pag.* 261, *lin.* 18. *for* in state *read* in a state. *lin.* 19. *for* binds to *read* binds us to. *pag.* 295. *lin.* 3. *for* power *read* body. *pag.* 438. *lin.* 29. *for* governance *read* governours. *pag.* 443. *lin.* 8. *for* obediences *read* obedience. *pag.* 582. *lin.* 23. *for* or be *read* or to be. *pag.* 584. *lin.* 6. *for* have been done *read* have done. *pag.* 638. *lin.* 31. *for* people *read* the people. *pag.* 649. *lin.* 24. *for* their *read* those. *pag.* 684. *lin.* 28. *for* all *read* at all.

INSTITUTES OF NATURAL LAW.

BOOK II.

CHAPTER I.

Of ſocieties in general, where all the members are equal.

I. *A ſociety what.* II. *What acts of a ſociety bind its members.* III. *Upon an equality of votes nothing is done.* IV. *Natural majority what, and how to be reckoned.* V. *Abſent members have a right to vote by proxy.*

I. A Society is a number of men united together by mutual conſent in order to deliberate, determine, and act joyntly for ſome common purpoſe. A ſociety what.

II. In every [a] ſociety, where all the members are equal, that is, where one has no more authority than another, whatever is determined by the whole or by the greater part is binding upon each of the members. What acts of a ſociety bind its members.

There can be no queſtion, whether the act of the whole is binding upon each of the members: becauſe each of the members is naturally bound by his own act; and the act of the whole is only the joynt act of each individual member. The chief doubt is, whether the majority can naturally by any joint act of theirs

[a] Grot L. II. C. V. § XVII.

bind, not only themſelves, but the whole ſociety, even thoſe, who are in the minority, and diſſent from ſuch act. This ſeems at firſt ſight to be inconſiſtent with a well-known rule, that, as all men are naturally equal, no perſon can be obliged by the act of another without his own conſent. But it is to be remembered, that when a man joyns himſelf to a ſociety, which is formed or inſtituted for the ſake of carrying on ſome certain purpoſe, he either expreſsly conſents, or muſt, by thus joining himſelf to ſuch ſociety, be underſtood tacitly to conſent, that this purpoſe ſhall be carried on. He obliges himſelf therefore by his conſent, either expreſs or tacit, to whatever is neceſſary for carrying on this purpoſe in ſuch a manner, as is conſiſtent with reaſon and equity. Now there are but three ways, in which a number of perſons can do buſineſs joyntly: it muſt be managed, either according to the ſentiments of the whole body, or according to thoſe of the greater part, or according to thoſe of the leſſer part. In all matters of a doubtful nature, or of an uncertain event; eſpecially where the number of perſons concerned is very great; it is next to impoſſible for all of them to agree in the ſame ſentiments. The purpoſes therefore, for which a ſociety is formed, could not be carried on, if nothing leſs than the full agreement of all the members was ſufficient to determine what was to be done, ſo as to bind each of them to concur in the ſame meaſure. But each member, when he joyned himſelf to the ſociety, conſented, that this purpoſe ſhould be carried on, and conſequently conſented to be bound in ſome reaſonable and equitable manner; though the whole ſociety ſhould not happen to agree. This then being the caſe; the next queſtion will be, whether it is more reaſonable and more equi-

table,

table, that the minority ſhould be bound by the act of the majority, or the contrary? The anſwer to this queſtion is obvious. It is planely moſt conſiſtent with reaſon, that the ſentiments of the majority ſhould prevail and conclude the whole: becauſe it is not ſo likely, that a greater number of men ſhould be miſtaken, when they concur in their judgment, as that a ſmaller number ſhould be miſtaken. And this is likewiſe moſt conſiſtent with equity: becauſe, in general, the greater number have a proportionably greater intereſt, that the purpoſes of the ſociety ſhould ſucceed well, and have more at ſtake, if thoſe purpoſes ſhould miſcarry or be diſappointed. This then being the moſt reaſonable and the moſt equitable way for a number of men to do buſineſs joyntly, when they are not all agreed upon the ſame meaſures; and each member of the ſociety having originally conſented, that the purpoſes, for which it was formed, ſhould be carried on in the moſt reaſonable and the moſt equitable manner; it follows that each member has conſented to have the buſineſs of the ſociety done according to the opinion of the majority; where there is not an unanimous agreement of the whole.

From hence it appears, that, although no perſon can naturally be obliged but by his own conſent, yet each perſon, who votes with the minority, is obliged by the act of the majority. He does not indeed give an explicit conſent to ſuch act at the time of voting: but there was a prior conſent, from whence this obligation ariſes: when he became a member of the ſociety, he conſented, either expreſsly or tacitly, that he would in all inſtances conform himſelf to what ſhould be the ſenſe of the greater part of that ſociety, to which he joyns himſelf, ſo as to become a member of it.

Upon an equality of votes nothing is done.

III. [b] Where the members of a ſociety are equally divided in their opinions upon any point; there is no more weight of reaſon or of equity on one ſide than there is on the other. No buſineſs therefore can be done: and conſequently all things muſt, upon ſuch an equality of votes, continue in the ſame ſtate, that they were in before, without having any change made in them. For this reaſon, ſays Grotius, where judges are equally divided in their opinions, as to acquitting or condemning a criminal, ſuch criminal is acquitted. And in like manner, where they are equally divided upon a queſtion of property, the poſſeſſor keeps the thing in diſpute.

But after he has thus aſſigned the true principle for theſe determinations, he goes on to obſerve, from Seneca, that, when one judge acquits and another condemns, the milder or more favourable opinion prevails. It is true in fact, that where the judges are thus equally divided upon the queſtion, whether a perſon accuſed of a crime is guilty of it or not, the milder opinion does prevail. But this is merely accidental. The natural reaſon, why it prevails, is, not becauſe it is the milder opinion, but becauſe nothing is done. A perſon accuſed of a crime is not properly a criminal, till the crime is proved upon him in the opinion of his judges. Unleſs this is done upon his tryal, he is deemed innocent, and is of courſe acquitted; there being no middle condition, after tryal, between being criminal and being innocent, between being acquitted and being condemned. If therefore, where the judges are equally divided in their opinion, nothing is done; the neceſſary conſequence is, that the perſon accuſed is acquitted: becauſe he has been tryed, and is not, in the opinion of his judges, proved to be guilty.

[b] Grot. ibid. § XVIII.

In

In like manner upon a queſtion of property, the poſſeſſor naturally keeps the thing in diſpute, if the judges are equally divided; not becauſe it is the milder opinion; but becauſe nothing is done, and things continue in the ſame ſtate, that they were in before the matter was litigated. As the poſſeſſor therefore had the thing before, ſo he keeps it afterwards; an equality of voices not having ſuch a weight againſt him, as to diſturb his poſſeſſion.

The fact indeed, which Grotius alledges, as the ground of this determination, might in many inſtances be queſtioned; I mean it might be queſtioned, whether the continuance of poſſeſſion is the milder opinion. But allowing it to be ſo; this is not the principle, which decides in the poſſeſſors favour. If this was the leading principle, then in all caſes, where there is an equality of voices, the more favourable opinion would take place, as well as in theſe two caſes, which Grotius mentions. Amongſt other caſes, which might be produced, where it is otherwiſe, we have one in our own univerſity. If a perſon petitions the ſenate for a degree, and the houſe is equally divided, his petition is rejected. This is certainly a determination on the leſs favourable ſide, and proceeds upon the other principle of doing nothing, where there is an equality of votes. He had no degree when he petitioned; and as an equality of votes does nothing, he continues in the ſame ſtate: ſuch an equality, not being ſufficient to produce any change, is not ſufficient to give him a degree.

But though naturally the buſineſs of a ſociety muſt ſtop, where the ſociety is equally divided in opinion; yet by mutual agreement this caſe may be provided for ſeveral ways. Some one member of the ſociety either by expreſs agreement, or by cuſtom, which is a tacit agreement, may have a caſting voice. Or the buſineſs, when,

for want of a majority, it cannot be done by the whole ſociety, may by poſitive inſtitution devolve to ſome particular members of it: and where ſuch inſtitution gives theſe ſelect members this power, their act, or, if it is ſo appointed, the act of the majority of them, becomes binding upon the whole: becauſe each perſon, when he conſents to be a member of the ſociety, is underſtood to agree to all the rules or inſtitutions of it. In ſome leſſer ſocieties a farther proviſion is ſometimes made: when a majority cannot be procured within the ſociety, the buſineſs devolves to ſome one or more perſons, who are not members of it And where ſuch proviſion has been properly eſtabliſhed, the determination of ſuch perſon or perſons is binding upon the ſociety: not becauſe ſuch a proviſion is naturally incidental to a ſociety; but becauſe, when it has been made and eſtabliſhed as a ſtanding rule of the ſociety, all, who become members of ſuch ſociety, if they do not conſent to it expreſsly, are underſtood by the act of making themſelves members to conſent to it tacitly.

Natural majority what and how to be reckoned.

IV. [c] From what has been already ſaid the reader will eaſily underſtand, that the natural majority in a ſociety, where no agreement has been made to the contrary, is a major part of the whole. A ſociety may be divided into three or more parts of as many different opinions: and though there may be a greater number of one opinion, than of either of the other two; yet unleſs that greater number is a majority of the whole ſociety, it is not ſuch a majority, as will naturally, or without ſome particular agreement, conclude the whole. If the members, who are of the other two opinions, when they are taken together, would make a majority of the whole ſociety, neither the equity nor the reaſon is with

[c] Grot. ibid. § XIX.

the

the third party. The equity is not with them; becauſe this third party has not a greater intereſt at ſtake: and the reaſon is not with them; becauſe this party is not more likely to judge rightly, than the other two, which differ from it. But as this may he urged equally againſt any one of the three parties; in ſuch circumſtances all buſineſs muſt ſtop; unleſs ſome method has been contrived and particularly ſettled for carrying it on. Some of the methods already mentioned, by which the buſineſs of a ſociety may be carried on, when there is an equality of votes, may be made uſe of here. Or it may have been particularly provided, either by expreſs conſent or by cuſtom, that whatever is agreed upon by the greater number, whether ſuch greater number is a majority of the whole or not, ſhall be concluſive. And though it is not naturally incidental to a ſociety to be determined by ſuch a majority as this; yet an expreſs agreement for this purpoſe, or long cuſtom, which is a tacit agreement, are natural means of obliging the members to be concluded by ſuch a majority.

It may happen, that, when a ſociety is divided upon any queſtion into three or more parties, though none of the parties taken ſeparately make a majority of the whole ſociety, ſo as to determine upon the whole queſtion, yet two of the parties may ſo far agree, upon part of the queſtion, as to make a majority for determining that part. And if theſe two parties are reckoned together for this purpoſe; then the remaining part of the queſtion is to be determined by a ſecond vote or ſcrutiny. Thus, if a ſociety of judges are divided into three parties, one of which condemns a criminal to death, another condemns him to baniſhment, and a third acquits him; the two former parties agree, that he is guilty, and

may be reckoned together to make a majority againſt thoſe, who acquit him. This part of the queſtion then is determined concluſively: the third party is over-ruled by the majority, which have agreed, that he is to be puniſhed, and is therefore obliged upon a farther ſcrutiny to joyn itſelf to one of the other two parties, ſo as to make a majority of the whole for ſettling what his puniſhment ſhall be. Suppoſe, one party of the judges to condemn the criminal in a fine of ten pounds, another party to condemn him in a fine of five pounds, and a third party to acquit him: thoſe, who condemn him in a fine of ten pounds, agree with the ſecond party, that he is to be fined: but though the leſſer fine of five pounds is included in the greater, yet this is no reaſon, why the fine ſhould be ſettled at five pounds. The two parties agree, or ſay the ſame thing, thus far, that he is to be fined: but then they do not agree entirely: they, who ſet the fine at ten pounds, may be underſtood to ſay, that he ſhall be fined five pounds; but this is not all, that they ſay; they ſay this and more. We cannot therefore, in order to procure a majority of the whole ſociety, follow the opinion of Grotius, as Gronovius has explaned it, and ſettle the fine at five pounds, but muſt, as in the former inſtance proceed to a ſecond ſcrutiny. The majority have determined, that the criminal ſhall be fined; they therefore, who were for acquitting him, are concluded thus far, and muſt upon the other part of the queſtion; how much the fine ſhall be? agree with one or the other of the two parties.

Theſe difficulties may however in moſt inſtances be avoided, if care is taken, in ſtating the queſtion, to divide it originally into all its parts, and then to put each part to the vote ſeparately. Thus in the

firſt inſtance, that we have been mentioning, if inſtead of voting from the beginning, what in general was to be determined concerning the perſon accuſed, the judges begin with voting, whether he is guilty or not; they can only divide themſelves into two parties. If this queſtion is determined in the affirmative, they may next vote, whether he is to be puniſhed capitally or not; and here again there can be but two parties. They may proceed in the ſame manner through the ſeveral ſorts of puniſhment, and may thus without much difficulty come to a clear deciſion.

[d] The foundation of a ſociety may be ſome real poſſeſſion, in which the ſeveral members of the ſociety have unequal ſhares. Thus a joynt ſtock of money may belong to ſeveral proprietors; and ſome of theſe proprietors may have ten times, ſome four times, ſome three times as great a ſhare in the capital, as others. In ſuch ſocieties, Grotius is of opinion, that the weight of each perſons vote, in regard to the management of the joynt ſtock, ſhould be eſtimated in proportion to his ſhare in that ſtock; or that, if he, who has one ſhare, has one vote upon any queſtion, he, who has two ſhares, ſhould have two votes, and he, who has ten ſhares, ſhould have ten votes. The equity of the caſe ſeems to be on this ſide; as it is equitable to allow each perſon a weight, in determining upon any queſtion, proportionable to the intereſt, which he has, that the whole ſtock ſhould be rightly managed. But the reaſon of the thing is on the other ſide: ſince there is no more likelihood, that a man ſhould judge rightly about the management of ſuch ſtock, becauſe he has ten ſhares in it, than there would have been, if he had been poſſeſſed of

[d] Grot. ibid. § XXII.

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no more than one ſhare. We cannot therefore from the nature of ſuch ſocieties determine either one way or the other: and this uncertainty makes it neceſſary, that the point ſhould be ſettled by particular agreement. In fact we find, that ſome ſocieties of this ſort have ſettled this point one way, and that others of the ſame ſort have ſettled it the other way.

Abſent members have a right to vote by proxy.

V. [a] When a ſociety meets to do buſineſs, the abſent members of it have a natural right to vote by proxy, that is, to appoint agents, who ſhall vote in their ſtead: becauſe what a man does by another is naturally as much his own act, as if he had done it in his own perſon. But when we ſpeak of the right of voting by proxy as a natural one, we muſt not be underſtood to mean, that it is an unalienable one, ſo that the members of a ſociety cannot by agreement bind themſelves either to vote in perſon or not to vote at all: we only mean, that, where no ſuch agreement has been made either expreſsly or by cuſtom, it is not incidental to ſociety, that no member ſhould have a right to act by another: every one has in this inſtance, as in all others, a right of appointing a proxy to act for him, unleſs he has conſented to part with that right.

A ſociety may indeed be ſo formed, that each member may be repreſented in it, though he has no particular proxy. To ſuch ſocieties, as theſe, it is naturally incidental, that the abſent members of them ſhould have no right of appointing any particular proxies: becauſe they are repreſented without having any. Thus if a ſociety, which is too large for all the members of it conveniently to meet together for doing buſineſs, chuſes a ſelect number or ſmaller ſociety out of

[a] Grot ibid. § XX.

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the whole, and delegates a power to this ſmaller ſociety to do buſineſs for them; each member of this committee or ſmaller ſociety, being likewiſe a member of the whole, has had his vote already in the choice of ſuch committee, and conſequently is repreſented in it. If therefore he ſhould at any time be abſent, when the reſt meet, he has no right of voting by any particular proxy, of his own immediate appointment; becauſe by this means he would be twice repreſented; once by the committee, which he had a ſhare in chuſing, and once by ſuch proxy ſo appointed.

But in all ſocieties, where there is no right of appointing proxies, and even in thoſe, which allow this right, if any member is abſent without appointing his proxy; ſuch members, as are preſent, conclude the whole: becauſe thoſe, who are abſent, are, by their not attending either in perſon or by proxy, underſtood to devolve their power of voting upon thoſe, who do attend.

CHAP.

CHAP. II.

Of civil ſociety, its nature and origin.

I. *Civil ſociety what.* II. *The motives, which lead men to form civil ſocieties.* III. *All mankind are not one civil ſociety.* IV. *The manner of forming civil ſocieties.* V. *Occaſions of forming civil ſocieties.* VI. *How men become members of civil ſocieties.* VII. *Members of a civil ſociety not to leave it without conſent of the public.* VIII. *How far allegiance to a civil ſociety is due from its baniſhed members.*

Civil ſociety what.

I. A Civil ſociety or, as we uſually call it, a ſtate has[f] already been defined to be a compleat aſſembly of men of free condition, who are united together for the purpoſes of maintaining their rights, and of advancing a common good. Theſe two purpoſes, which civil ſociety has in view, point out to us the mutual claims of ſuch ſociety and of its ſeveral members.

Each individual, who aſſociates himſelf with others, ſo as to form with them one civil ſociety or body politic, does it with a view of obtaining their aſſiſtance in the maintenance and ſupport of his rights; that is, he propoſes to himſelf the advantage of being protected againſt ſuch injuries, as he might have been expoſed to, if he had continued in a ſtate of nature. On the other hand, the body politic, to which he joyns himſelf, that is, the other individuals, with which he aſſociates, expect in return, that, as he is protected by them, he ſhall agree with them in whatever is neceſſary or conducive to their common benefit.

[f] See B. I. C. I. § XI.

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Now as theſe are the known purpoſes, which the body and each of its members have reſpectively in view, in aſſociating with one another; the very act of aſſociating, though there ſhould be no expreſs ſtipulation between them, implys, that the ſociety, conſidered as a body, agrees to the terms, upon which each individual joyns himſelf to it; and that each individual agrees to the terms, upon which the ſociety admits him as a member. And thus the ſociety obliges itſelf to protect its ſeveral members; and each member obliges himſelf to pay allegiance to the ſociety, that is, to conform himſelf to whatever ſuch ſociety ſhall judge to be for the common good.

The motives which lead men to form civil ſocieties.

II. Under the notion of protection two things are implyed, firſt the aſcertaining our ſeveral rights and conſequently the ſeveral duties that correſpond to them, and ſecondly the uſe of ſuch force as is neceſſary to prevent thoſe rights from being violated. The law of nature conſiders all mankind as one great ſociety, and obliges them in this view not to hurt one another, and mutually to do for one another all ſuch kind offices, as are in their power. And if all mankind were fully informed of the ſeveral particulars included in this general rule, and were ready to act accordingly, they would have no inducements to ſeparate themſelves into leſſer communities, or to form civil ſocieties. But though the general rule of duty may be plane and obvious, yet all men are not able to apply it to particular inſtances of practice, and even amongſt thoſe, who can apply it, few are willing, to act up to it. [g] The law of nature has indeed provided a remedy againſt injuries in the equality of nature: any perſon, who is either in danger of ſuf-

[g] B.I. C. XV. and C. XVII. and C. XVIII.

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fering an injury, or has actually ſuffered one, may make uſe of force either to defend or to redreſs himſelf. But this remedy will frequently be inſufficient, when he has no force but his own to carry his claims into execution, and to ſupport him in the enjoyment of what he has a right to. If thoſe, who unjuſtly oppoſe or attack him, are ſtronger than he is; his right will avail but little againſt their ſuperiour ſtrength. He might indeed defend himſelf; but he is not able: he might demand reparation of what damages he has ſuſtained; but he is too weak to enforce this demand: he might inflict puniſhment upon them, who have done wrong and ſo ſecure himſelf for the future; but they are ſtronger than he is, and refuſe to ſubmit to it. However, we are to obſerve, that not only the perſon, who has ſuffered an injury, but thoſe likewiſe, who have done one, have ſometimes occaſion for more ſtrength, than they are maſters of, to ſecure what they have a right to. As the ſufferer is apt to be too much blinded by paſſion and byaſſed by prejudice, to ſee how far his duty will allow him to go; there is commonly occaſion for ſome leſs prejudiced underſtanding than his own, to lead him to what is right, and for ſome ſuperiour ſtrength, to oppoſe itſelf to his paſſions and prevent him from doing what is wrong.

[h] All men may indeed, in the liberty of nature, joyn their force to ſupport the practice of juſtice: but then they are not obliged to do ſo; they are not ſo far bound to make themſelves parties in the quarrel of another, as to give him any right to demand it of them. And even if he could demand their aſſiſtance, he would many times have no benefit from it; unleſs

[h] B. I. C. XIX. § IV.

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he had ſtrength enough to compel them: and it is only for want of ſuch ſtrength, that he has any occaſion for their aſſiſtance.

Here then are ſufficient motives to engage mankind to enter into civil ſocieties, that every one may, by the joynt underſtanding of many, be informed of his duty, and that every one may, by the joynt force of many, be compelled to practiſe it. Nor can we well conceive any other motives, that ſhould lead mankind thus to aſſociate, but what may be reduced to one or other of theſe two heads: becauſe all would be as happy, as they could wiſh to be, or at leaſt as the condition of human nature would allow them to be; if all were fully informed of their duty, and all were willing and ready to comply with it.

All mankind are not one civil ſociety.

III. The motives, which we have been ſpeaking of, would not engage any man to aſſociate himſelf with all his ſpecies. What he is chiefly concerned in is, that they who live near him, or with whom he has the moſt frequent intercourſe, ſhould have their duty aſcertained, and ſhould be held to the performance of it by ſuch a force, as is ſufficient to reſtrain or to correct them. His intereſt will be ſecured, as far as he wants to have it ſecured, provided they, who are moſt likely to hurt him, or to hinder his benefit, are informed what they ought to do, and what they ought to avoid; and provided he aſſociates himſelf with ſuch a number, as will have force enough to guard him againſt the injuries, which he fears, or to redreſs the injuries, which he has ſuffered. As good care is taken of his happineſs, as he has occaſion for, by joyning himſelf to a part of mankind: if they, to whom he is joined, are properly informed of their duty, and have ſtrength enough both

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to enforce the practice of this duty amongſt themſelves, and to repel the injuries of all, who are not aſſociated with them, it is of no importance to him to joyn himſelf in this manner to any more, and much leſs to form the ſame ſort of connection with all mankind.

It is neceſſary, that the number of perſons thus uniting themſelves ſhould not be very ſmall: becauſe though others, who are at a diſtance from them and have but little intercourſe with them, are not very likely to injure them at all, or at leaſt have not an opportunity of injuring them frequently; yet ſince what is not very likely to happen often, may poſſibly happen ſometimes; it is convenient to have ſuch a number united, as will be able, not only to reſtrain them, who are members of the ſame ſociety, from doing what is wrong to one another, but to repel likewiſe the violence of others, who are not aſſociated with them. But in the mean time the ends, which men propoſe to themſelves in forming civil ſocieties, are ſo far from leading them to aſſociate in this manner with their whole ſpecies, that in ſuch a bulky ſociety theſe ends could not be conveniently and effectually anſwered. The common underſtanding of ſuch an extenſive body could neither be collected nor made known, ſo as to guide all the parts of it: and ſuch an unwieldy body would be unable to exert its joynt force. There would indeed be no exerciſe of a common force wanting to repel the external enemies of this vaſt community; becauſe, by the ſuppoſition, all mankind are included in it. But then as the ſeveral parts of it have ſuch inconſiſtent humours, and ſuch different intereſts; ſome or other of them would ſet up for themſelves, and would be daily forming leſſer bodies with an intereſt of their own, ſeparate from the intereſt of

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the reſt. And as the joynt force of the whole could not exert itſelf to repreſs ſuch parties, after they were formed, thoſe parties would be able to do what they pleaſed; unleſs the force of their neareſt neighbours was ſufficient to repreſs them. But as this neighbouring force would not always be ſufficient for this purpoſe, the parties ſo formed would ſometimes eſtabliſh themſelves into a ſeparate ſociety. It would therefore not only be uſeleſs, as to the ends of engaging in civil ſociety, to form one of ſuch a vaſt extent; but even, if ſuch an one was formed, it would be impoſſible for it to ſubſiſt long, without being broken to pieces, and reſolved into ſuch ſmaller bodies, as can be directed by the common underſtanding or general ſenſe of their reſpective wholes, and can exert ſuch a joynt force, as is neceſſary, not only to guard themſelves from foreign enemies, but to reduce their ſeveral conſtituent parts to obedience, and by this means to keep themſelves together.

The manner of forming civil ſocieties.

IV. What has been already ſhewn, in the former part of this work, concerning the natural rights of mankind conſidered as individuals, will ſerve to teach us by what means civil ſocieties muſt be formed, in order to make them conſiſtent with thoſe natural rights. [1] Every man has naturally a right to think and to act for himſelf. The law of nature has indeed reſtrained him from doing what is unjuſt, and has ſubjected him to proper checks to prevent him from cauſeleſsly hurting others, and to proper puniſhment, if he does cauſeleſsly hurt them: it has obliged him likewiſe to advance the happineſs of mankind, as he has ability and opportunity; but then it leaves him to judge and determine for himſelf in

[1] B. I. C. X. § III.

what inſtances he can conveniently advance their good, and to chuſe for himſelf the means of doing it. When he becomes a member of a civil ſociety, the public or body politic claims a right of pointing out to him what is juſt and what is unjuſt, and of directing him likewiſe what good he is to do, and in what manner he is to do it. There is no way of making ſuch a claim as this conſiſtent with his natural right of thinking and chuſing for himſelf; unleſs by his own conſent, either expreſs or tacit, he has waved this right, and has voluntarily agreed to be ſo guided and directed. Every man has naturally a right to make uſe of his own force, either for his own defence, when he is in danger of being injured, or to obtain reparation and to inflict puniſhment, when he has been injured. But the civil ſociety, to which he is joined, claims a right to judge both upon what occaſions any force is lawful, and what force is lawful upon theſe occaſions. And as it takes him and all its other members under the protection of the common force, and conſiders him as a part of the public; it does not allow him to exert his own force, but in concert with the public, and requires him ſo to exert it, whenever it is wanted. Here again the claim of civil ſociety, upon the individuals, that compoſe it, cannot be reconciled with the natural rights of mankind, unleſs each individual has, either by expreſs or tacit, by explicit or implyed conſent, parted with ſuch rights, and agreed, that, where the public force can defend or redreſs him, he will never make uſe of his own, but in ſuch manner, as the public ſhall direct. Thus the liberty of individuals is abridged in a ſtate of civil ſociety: the community has ſuch a claim upon them in reſpect both of the rules, which they are to follow, and of the manner,

manner, in which they are to make uſe of their force, as the ſame men, that compoſe the ſociety, would not have had, either ſeverally or joyntly, if they had continued unaſſociated, or had remained in that ſtate of equality, in which all mankind are naturally placed. And as it would be an injury to take any part of their natural liberty from them without their conſent; the conſequence is, that civil ſocieties could not be formed, conſiſtently with natural juſtice, by any other means, than by the joynt conſent, either expreſs or tacit, of thoſe, who compoſe it.

Each individual, who thus conſents to give up a part of his natural liberty, obtains however more than an equivalent for what he gives up. If he ſubmits to be guided in his duty by the public underſtanding or general ſenſe of the community, to which he joyns himſelf; thoſe, who are near him, and with whom he has the moſt frequent intercourſe, ſubmit in return to be guided in the ſame manner. And as by this means he is leſs likely to tranſgreſs the duty, which he owes to others; ſo he has good reaſon to expect, that others will be leſs likely to tranſgreſs the duty, which they owe to him; than if both they and he had continued in a ſtate of natural independency. As he parts with his independent right of uſing his own force according to his own diſcretion, either to defend or to redreſs himſelf, and gives the public a claim upon him to joyn his force with theirs, who are aſſociated with him, whenever his aſſiſtance is wanted; ſo in return he is aſſured of the protection of the community, and has the advantage of a ſtronger force, than his own, to defend and to redreſs him, when he has a reaſonable occaſion for it.

As this principle of forming a civil ſociety by the mutual conſent of thoſe, who are members of it, is ſufficient to reconcile the obligations, which each member is under to the public, with their reſpective natural rights; ſo it will likewiſe ſhew us, that their aſſociating themſelves together in this manner is not contrary to the rights of others, who are not aſſociated with them, and to the obligations, which they are under to the reſt of their ſpecies. The claim, which the public has upon the liberty of each individual, who is a member of it, ariſes originally from his own conſent. This [k] claim therefore can extend no farther, than ſuch individual had a power of binding himſelf or of alienating his liberty. Now each individual, who joyns himſelf to any civil ſociety, is under a prior obligation to obſerve the laws of nature, and to make them the rule of his conduct towards all mankind: and as he has not the liberty of tranſgreſſing thoſe laws, he cannot alienate a liberty, which he never had: and conſequently he cannot give the ſociety a right to require him to tranſgreſs them. When therefore a number of men have united themſelves together for the purpoſes of maintaining their rights, and of promoting their common good; what they have done in order to obtain theſe purpoſes is no injury to the reſt of mankind. The individuals, who are thus aſſociated, are ſtill under the ſame obligations towards all ſuch, as are not aſſociated with them, that they would have been under, if they had ſtill continued in the liberty of nature. Whatever adventitious obligations ariſe from the civil connection of theſe individuals with one another, they muſt be ſuch as are conſiſtent with the duties, which they naturally owe to the reſt of man-

[k] B. I. C. X. §IV.

kind,

kind, who are not joyned to them by any connections of this ſort. Thoſe, who are members of the ſame civil ſociety, acquire new rights and are laid under new obligations in reſpect of one another. But then, ſince theſe rights and theſe obligations muſt be conſiſtent with the law of nature, all, who are members of the ſame civil ſociety, are ſtill bound to obſerve the law of nature towards the reſt of mankind; their rights and obligations in reſpect of all ſuch, as are either members of different civil ſocieties, or remain in the liberty of nature, are the ſame, that they would have been, if no ſuch civil connections had ever been formed.

Occaſions of forming civil ſocieties.

V. The occaſions of forming or beginning diſtinct civil ſocieties have been various. A number of individuals, falling into diſtreſs at one and the ſame time, and hoping by their joynt force and mutual aſſiſtance to mend their condition, have in many inſtances been the founders of new civil ſocieties. Thus a multitude of the Heneti, who had been driven from Paphlagonia, joyned themſelves to Antenor, and ſettling with him on the coaſt of Italy founded the ſtate of Venice. It may perhaps be denyed, that there ever was a time when all mankind lived in a ſtate of nature. But be this as it will: there certainly have been many perſons, who at one and the ſame time have been broken off from ſocieties already eſtabliſhed, and have been forced to ſhift for themſelves independently of one another. Individuals in theſe circumſtances are properly in a ſtate of nature, and have no other connections with one another, beſides what they make by joynt conſent: and their common diſtreſs is a natural occaſion of endeavouring to form ſuch connections for their mutual relief and ſupport.

But diſtreſs has not always been the occaſion, which led men to unite together and to form a common or civil intereſt. They have ſometimes been brought together by their birth, that is, by having ariſen from the ſame common parent. I would not be underſtood to mean, that parental power is the ſame with kingly power; and that the children of the ſame parent were under any natural obligation to ſubmit to ſuch parent as their civil governour, after they were grown up. They were ſubject indeed to his parental authority, whilſt they continued in the ſtate of infancy; and this might induce them to place themſelves afterwards by their free conſent under his civil juriſdiction. But if no ſuch [g] conſent had intervened; then as ſoon as they were grown up, and were able to think and to act for themſelves, they were naturally at liberty either to continue in his family, and ſo to become ſubject to his power, as the head of this little community, or elſe to withdraw themſelves from it, and to begin other families or communities of their own. Their children again, when they came to years of diſcretion, would enjoy the ſame liberty; they might either remain with the original anceſtor, and ſo encreaſe the family; or they might ſeparate themſelves from this community and ſet up for themſelves. If the children of the ſame parent, and their deſcendents after them, choſe to remain united together under the direction of the common anceſtor; ſuch a number of free men ſo united by their own conſent, in order to ſecure their reſpective rights, and to advance their common intereſt, would form a civil ſociety. I call them free men; notwithſtanding the ſubjection to their common anceſtor, which began from their birth, might be continued during the

[g] B. I. C. XI. § V.

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life-time of ſuch anceſtor: becauſe when they were at age to judge for themſelves, they were free to ſeparate themſelves from his family: and if their ſubjection to him as their civil governour continued, it was the effect of their own act. His authority as a parent ceaſed, when they attained to the uſe of their reaſon: and whatever authority, properly ſo called, he might have over them afterwards, as parts of his family, it was derived from their chuſing to continue in this family, of which he was the head. If any of the immediate or the remoter deſcendents of this common anceſtor found reaſons to leave the family; thoſe, who ſo ſeparated themſelves from it, acted as conſiſtently with the law of nature, and conſequently had as good a right to do what they did, as the others, who remained in it. For the law of nature, after children are arrived at a proper age, ties them to no other duty in reſpect of their parents, beſides thoſe of gratitude and reverence: and theſe are duties, which will not confine them to live under the juriſdiction of their parent; they are duties, which imply no ſuch ſubjection, as will oblige the children to continue in the parents family, and to ſubmit themſelves to his civil authority.

The [1] jewiſh ſtate aroſe from ſuch a beginning as this. The deſcendents of Abraham, in thoſe branches of the family, which were derived from Iſaac, and after him from Jacob, continued together; till they were ſo encreaſed, as to become a multitude; and till their family-connection ended in a civil union. In the mean time Iſhmael and Eſau, with their reſpective deſcendents, ſeparated themſelves from the reſt of the family; and each of them founded diſtinct bodies

[1] Gen. C. XVI. XVII. &c.

politic. They became wholly unconnected with the reſt of their brethren, and with each other, and had no other connection with their reſpective parents, beſides the ties of filial love and reverence. We have an inſtance of this filial love in Iſhmael, when he joyned with his brother Iſaac[m] in burying their common parent. And I chuſe to take notice of this circumſtance, that the reader may not imagine the ſons duty of filial reverence to be inconſiſtent with his civil independency: for it is plane, that Iſhmael, notwithſtanding this act of filial reverence, had no civil dependence upon his father Abraham: becauſe he was then ſeparated from the family of Abraham, not only by his own choice, but by the act of Abraham himſelf, and conſequently was ſo entirely free from all proper juriſdiction of his parent, as to have a full right to diſpoſe of himſelf in what manner he pleaſed. It is farther obſervable in this patriarchal family, that a ſon, by being ſeparated from the family of his parent, not only ceaſes to be under the juriſdiction of this family with the parent at the head of it, but may even acquire civil juriſdiction over it. Joſeph was accidentally ſeparated from the reſt of his brethren, and began a family of his own in Egypt; where he was advanced to civil authority not only over the native egyptians, but over all ſtrangers, who were permitted to ſettle in that country; amongſt whom we find his father and his brethren. No one can reaſonably deny, that in theſe circumſtances he had as good a natural right to found a diſtinct ſociety, as his father Jacob had. Any poſitive command of God to keep all the children of Jacob united together is here out of the queſtion. As we are now conſidering how civil ſo-

[m] Gen. XXV. 9.

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cieties may begin, and what may give occaſion to the founding of them conſiſtently with natural right; we might be excuſed from taking notice of whatever is matter of poſitive inſtitution. However we find, that even in this family, which was kept together by ſuch poſitive command, the deſcendents of Joſeph were looked upon as parts of a new family, exempt from the patriarchal juriſdiction, till they were recalled into it by [n] adoption or conſent of parties. So little ground is there for concluding, that, becauſe family-connections have in ſome inſtances been the occaſion of civil union, therefore civil power is naturally derived from parental authority, without the conſent of thoſe, who are ſubject to ſuch civil power.

The reader, if he attends to the hiſtory of Abrahams family, will be able to deduce theſe conſequences from it. Firſt, civil ſocieties may frequently begin from family-connections: the children and deſcendents of the ſame common ſtock, having been connected with one another originally, may chuſe to continue united, and by ſuch a voluntary union, which their original connection led them to, may form a body politic. But then ſecondly; though every child is born under a natural ſubjection to his parents; yet he becomes independent of them, as he advances in years, and is able to think and to act for himſelf. He is therefore at liberty either to ſeparate himſelf from his brethren, to remove himſelf from under the juriſdiction of his parents, and to begin a family or ſociety of his own, or elſe to continue with his brethren, to remain under the juriſdiction of his parents, and ſo to make a part of that community, of which his parents are the head. If the child

[n] Gen. XLVIII. 5. 6. 16.

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ſeparates himſelf from the family of his parents, their authority over him is at an end; nay he may even acquire civil juriſdiction over them. He ſtill owes them indeed the duties of gratitude and eſteem; and as the inſtance of Iſhmael already mentioned will ſerve to teach us, that theſe duties are conſiſtent with the civil independence of the child, ſo the behaviour of Joſeph towards his father is an evidence, that the duty of filial piety is ſo far from ſubjecting the ſon to any civil juriſdiction of the father, that it is conſiſtent even with the ſons civil juriſdiction over the father. If the child remains in the family of the parent: then indeed the parents authority over him continues after he is come to years of diſcretion: but it is continued no otherwiſe, than by the choice and voluntary act of the child: it is his own conſent, either expreſs or tacit, which produces civil juriſdiction, when paternal authority ends.

If any one doubts, whether civil ſociety aroſe at firſt from mutual conſent, and his doubts proceed from a notion, that mankind were never actually in a ſtate of equality, becauſe all men were born in a natural ſubjection to their parents; it will now be eaſy to clear up this difficulty. The ſubjection of a child to the authority of his parents continues during his infancy: but after he is come to years of diſcretion, he is then, as to any juriſdiction or authority, properly ſo called, equal to his parents, and is therefore, in reſpect of them, ſo far in a ſtate of nature, as to be at liberty either to joyn with them in the ſame ſociety, or to begin a ſociety of his own. Suppoſe it therefore to be true in fact, that civil ſociety is as antient as the race of mankind, and that the natural connections of the firſt family gave occaſion to the firſt civil ſociety; yet this

this ſuppoſition will be no objection to what has been ſaid concerning the means, by which civil ſocieties are formed. Theſe family-connections might give occaſion to civil union; but ſuch union could never be formed conſiſtently with that natural equality and independency, to which all men are born, without ſome expreſs or tacit conſent of the individuals ſo united. Notwithſtanding the firſt mans parental authority over his children, he would have had no natural right to keep them in ſubjection, after they became capable of thinking and acting for themſelves; if they had not agreed to ſubmit to him as their civil governour.

It is probable indeed, that the firſt civil ſocieties were nothing elſe but ſo many diſtinct families with their reſpective parent at the head of each of them. But then we cannot well imagine, that in theſe firſt rudiments of civil ſociety, or theſe firſt attempts to form bodies politic, every thing was immediately as well regulated, as we find it at preſent. There is not the leaſt appearance of reaſon for believing, that the ties, by which the ſeveral parts of theſe bodies were united to one another, were the ſame then, that we find them to be now. We muſt on the one hand be but little acquainted with the hiſtory of mankind, or of the beginning of nations; if we can perſuade ourſelves, either that the firſt civil ſociety was formed by a regular meeting of a number of men, who had before lived in a ſtate of nature, and then agreed to unite into a body politic, which aroſe at once from ſuch agreement, complete in all its parts, as well methodized as the ends of forming ſuch bodies require, as the light of reaſon could ſuggeſt, or the law of nature admit. On the other hand, if we are aware, that the firſt rudiments of

civil

civil ſociety were laid amongſt the children of the ſame parent and amongſt the families deſcended from the ſame common ſtock; we muſt have made but few obſervations upon the gradual improvements in all other human inventions, if we can perſuade ourſelves, that ſocieties were from the beginning kept together by the ſame ties, which keep them together at preſent. One would rather think, that a common affection for their parent, a deference to his judgment, a ſenſe of his regard for them, and the inconvenience of leaving him, were the bands, which at firſt kept his deſcendents together. As theſe bands would be broken by his death, the ſeveral families, which were derived from him, would then be at liberty to ſeparate from one another. Thus the ſeveral ſons of the ſame parent, who continued in a ſort of temporary ſociety, whilſt he lived, would be in a ſtate of nature, after his death, and might either by a ſubſequent conſent continue united under ſuch a form of government, as they could agree upon, or elſe might each of them aſſert his own independency, and begin a ſociety from that branch of the family, of which he himſelf was the head.

We meet with ſomething like this in the hiſtory of Jacob and Eſau. [o] Though Eſau complained of having been defrauded by his brother; yet, whilſt they continued in the family of Iſaac, he conſidered himſelf as under the juriſdiction of their common parent, and did not propoſe immediately to puniſh the act, which he complaned of, but reſolve, that, after Iſaacs death, he would aſſert his own independency and would kill his brother Jacob. His [p] convenience however led him afterwards to ſeparate from his father, and to

[o] Gen. XXVII. 41. [p] Gen. XXXII. 3. 4. &c.

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ſet up for himſelf, before this event happened. By this means he became independent of the little ſociety, to which he formerly belonged, and was advanced to be the head of ſuch another ſociety of his own forming. Jacob was aware of this; and knowing, that his brother Eſau was no longer under the juriſdiction of their common parent, he did not think himſelf ſafe under Iſaacs protection, but ſought for other means of ſecurity, and endeavoured to purchaſe the friendſhip or at leaſt to appeaſe the anger of Eſau by a preſent.

It is not neceſſary to ſuppoſe, that all civil ſocieties were encreaſed, till they became as large, as we now find them, by the conſtant addition of freſh deſcendents from the ſame original parent. As the ſons of one common parent, and the families derived from thoſe ſons, who had conſented to remain united together under the juriſdiction of ſuch parent, as long as he lived, were at liberty after his death either to continue in a like union, or to ſeparate from one another; ſo the ſons of different families, and their deſcendents with them, in conſequence of ſuch a liberty as this, might joyn with one another and form larger bodies, which did not come originally from the ſame common ſtock. Such unions may frequently have been occaſioned by the want of a ſettlement, or by the fear of unjuſt violence. The fear even of juſt puniſhment has undoubtedly ſometimes encreaſed the multitude in a ſociety thus joyned together: and Rome itſelf would have begun from ſmaller numbers than it did, if its founder had not opened an aſylum to ſcreen criminals from juſtice. Nay there is ſome reaſon to believe, that the firſt ſociety, which we read of, owed its original to

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ſuch an occaſion as this. [q] The firſt city, that hiſtory makes mention of, was built by Cain. And if Cain does not ſhew what motive led him to this undertaking, when he declares his apprehenſion, that every one, who found him, would kill him; yet we may learn it with ſome degree of certainty from what Lamech is recorded to have ſaid to his two wives. He did not chuſe to be ſhut up with his brethren, but was deſirous to live at large like the reſt of mankind: and to encourage his wives not to fear, that the crime of their anceſtor would be puniſhed upon them, he clears himſelf from the guilt of it, and aſſures them, that there was no danger in leaving their preſent way of life, and in truſting themſelves abroad. This will be the moſt obvious meaning of what he ſays to Adah and Zillah, if we render the words, as they may be rendered — Have I ſlain a man to my wounding, and a young man to my hurt? If Cain ſhall be avenged ſeven-fold, truly Lamech ſeventy and ſeven-fold.

How men become members of civil ſocieties.

VI. The condition of mankind is at preſent ſomething different from what it was formerly, when civil ſocieties firſt began to eſtabliſh themſelves. Such ſocieties are now eſtabliſhed in almoſt all parts of the world, that are inhabited at all: they are no longer in their firſt rudiments, as they were whilſt ſeparate families were making attempts to ſettle themſelves, and to collect a force ſufficient to repel injuries, but are founded upon ſteady principles, and unite their ſeveral members together by firm and laſting ties. And yet even in the preſent circumſtances of mankind, numberleſs individuals have an opportunity of ſetting themſelves free from theſe ties in ſuch a manner, as to

[q] Gen. IV. 17 23.

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be at liberty either to found new civil ſocieties, or to unite themſelves to ſuch new ſocieties, as others have begun.

It will be neceſſary, for the better underſtanding this matter, to conſider by what means men naturally become members of any particular nation or civil ſociety; and by what means, after they are ſo become members they may be at liberty to ſeparate themſelves from it again. Civil ſocieties in general are willing to conſider perſons, who are born amongſt them, as members of thoſe ſocieties where they are born. It is plane, that they are conſidered in this light, becauſe if they were looked upon as aliens, till they have been formally admitted to be members, they would, like all other aliens, be incapable of inheriting immoveable goods. But then this is matter of favour in the ſociety; and perſons ſo born ſeem to be naturally at liberty either to make uſe of this favour or to refuſe it. There does not appear to be any natural reaſon why a child, though he is born of parents, who belong to any particular nation or civil ſociety, and is born likewiſe within the territories of that nation, ſhould be obliged, after he is come to years of diſcretion, to continue in it. Poſitive inſtitutions may indeed have ordered it otherwiſe: but he appears to be naturally at liberty either to make himſelf a member of that ſociety, if it will receive him, or to joyn himſelf to any other, or to begin a new one in any part of the world not yet inhabited. He may indeed part with this liberty, after he is capable of thinking and of acting for himſelf, either by expreſs or by tacit conſent. If any expreſs ſtipulations for that purpoſe paſs between him and the ſociety, in which he was born, he makes himſelf a

member

member of it, and is no more at liberty, after ſuch ſtipulations, to leave this ſociety, than he is to depart from any other contract, by which he has bound himſelf. But without any formal or expreſs ſtipulations, he may unite himſelf effectually to the ſociety, in which he is born, by tacit conſent. After he is arrived at maturity of judgment, if he continues to make uſe of the protection of that ſociety, and to pay it ſuch allegiance, as it requires of its members; his conduct muſt neceſſarily be underſtood as an evidence on his part, that he is willing or conſents to be a member of it, and on the part of the ſociety, that it conſents to receive him. Amongſt other inſtances of tacit conſent we may reckon his taking and holding ſuch immoveable goods, as are in the juriſdiction or general property of the ſociety. As [1]aliens cannot naturally take and hold ſuch goods; it is plane, that the ſociety by allowing a native to take and hold them conſiders, or however is willing to conſider, a native as a member. And whoever makes uſe of this favour declares by ſo doing that he is willing or conſents, to be conſidered in the ſame light, in which the ſociety conſidered him. And it may be worth the while to obſerve, that though he ſhould afterwards relinquiſh his goods, or diſpoſe of them by ſale or by gift, he does not ceaſe to owe allegiance to the ſociety: becauſe the juriſdiction of the ſociety over him did not ariſe merely from the poſſeſſion of ſuch goods, but from his conſent to be a member of it, of which conſent his ſo taking and holding theſe goods was an evidence.

The only natural difference between a native and a foreigner, in reſpect of their becoming members of

[1]B. I. C. VI. § VI.

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any particular civil ſociety, is, that the native was certainly never united to any other ſociety; whereas the foreigner may poſſibly have been united to ſome other, before he came to ſettle within the territories of this. The effect of this doubt, concerning the poſſibility of the foreigners being a member of ſome other civil ſociety, is, that he cannot become a member of the nation, in whoſe territories he ſettles, without ſome expreſs ſtipulations, by which he engages his allegiance to this nation, and is formally received by it. If he continues there any time before he makes theſe expreſs ſtipulations, and before he is formally received as a member; he is obliged to behave himſelf peaceably and to ſubmit to the laws of the country; becauſe the ſociety would not ſuffer him to ſtay within its territories upon any other terms. This peaceable behaviour therefore is no evidence on his part, that he owes no allegiance any where elſe: and the ſociety by allowing him to ſtay within its territories, before this point is cleared up, cannot be underſtood tacitly to receive him as a member. In the mean time he cannot unite himſelf to the ſociety by taking and holding ſuch land, as is under its juriſdiction: becauſe as long as he is conſidered as an alien, that is, till he is formally admitted into the ſociety, he is naturally incapable of taking and holding ſuch land. Theſe principles however are not applicable to foreigners, who have been brought by their parents into the territories of any nation, and have ſettled there, whilſt they were in their infancy. For at that time of life, they could naturally owe no allegiance elſewhere. And conſequently, if any diſtinction is made between ſuch foreigners and natives, it muſt be derived merely from poſitive inſtitution.

But notwithſtanding the cloſe ties, by which, in the preſent conſtitution of civil ſocieties, men are generally underſtood to be connected with thoſe particular ſocieties, of which they are members; it is poſſible for them to recover a natural right of founding and eſtabliſhing new ſocieties independent of that, to which they formerly belonged. Where the territories of a nation are ſmall, or where the inhabitants even of a large territory become very numerous, eſpecially if they have not the ſkill or the opportunity of ſupplying themſelves with neceſſaries by huſbandry, or by trade and by manufactures; it will be for the convenience of all parties, that companies of adventurers ſhould be ſent out to ſeek their fortune. Sometimes a powerful faction in a ſtate think it for their intereſt to drive out their weaker antagoniſts. Sometimes a lawleſs tyranny, uſurped over the religious or civil rights of the ſubjects, leaves them only the alternative either of ſubmitting to oppreſſion and cruelty, or of freeing themſelves by a voluntary exile. Sometimes by war or other calamities a civil ſociety, which was formerly eſtabliſhed, may be broken in pieces. In any of theſe caſes, and in many others of the like ſort, which the readers own imagination, or his acquaintance with the hiſtory of mankind may ſuggeſt to him, there are individuals enough reſtored to the liberty or equality of nature to begin new ſocieties, in any part of the world, where they can gain a ſettlement, and under any form of government, that is agreeable to themſelves. And as individuals, when they are in theſe circumſtances, are at liberty to found a civil ſociety of their own, if they have numbers ſufficient for ſuch a purpoſe; ſo are they at liberty to joyn themſelves to any civil ſociety, which is already eſtabliſhed, and is willing to receive them.

VII.

VII. [r] Grotius is inclined to think, that individuals, after they are become members of any particular civil ſociety, are at liberty to withdraw themſelves from it at any time, even without having firſt obtained the conſent of that ſociety. The principal or indeed the only reaſon, which he offers in ſupport of this opinion, is, that though ſuch a liberty might be inconvenient to the ſociety in reſpect of the members, which it loſes; yet this inconvenience may be balanced by the general conſideration, that, if this is the caſe in all civil ſocieties whatſoever, each in its turn would be as likely to gain new members from others, as to loſe old members of its own. But the determination of this queſtion does not depend upon prudential reaſons, which can only give occaſion to poſitive inſtitutions; but upon ſuch reaſons, as are drawn from thoſe mutual ties, between the body politic and its ſeveral members, which neceſſarily reſult from the nature of civil ſociety.

Members of civil ſociety not to leave it without conſent of thepublic.

Grotius himſelf makes ſuch conceſſions upon this head, as will be ſufficient to overturn his own opinion. In the firſt place he allows, that it is inconſiſtent with the nature of civil ſociety for its members to withdraw themſelves in great numbers at one and the ſame time. For we cannot ſuppoſe civil ſociety to form itſelf upon ſuch principles, as naturally tend to its own deſtruction: and conſequently we cannot ſuppoſe the nature of it to be ſuch, as will allow the members to withdraw themſelves in great numbers at once; becauſe ſuch a liberty as this tends to deſtroy it. From this conceſſion we may reaſon in the following manner. If any one individual is at liberty to withdraw himſelf at any time from the civil ſociety, of which he is a member, without having

[r] L. II. C. V. § XXIV.

firſt obtained the conſent of that ſociety; any other individual has the ſame liberty. If any two individuals may thus leave the ſociety, whenever they pleaſe, any other two may leave it in like manner. And what is naturally lawful for any four individuals, muſt upon the ſame principles be equally lawful for any four hundred, or any four thouſand, or any other number of them. We cannot therefore maintain, that a ſingle member of a civil ſociety may leave the ſociety, to which he belongs, whenever he pleaſes; unleſs we will maintain farther, that any number of members may leave it, at any time. But our author allows, that it is inconſiſtent with the nature of civil ſociety for great numbers thus to withdraw themſelves: and conſequently he ought upon his own principles to allow, that it is equally inconſiſtent with the nature of civil ſociety for any ſingle member to leave it, till he has firſt obtained the conſent of the ſociety.

Grotius allows farther, that where the ſociety has any particular intereſt in keeping all its members together; ſuppoſe for inſtance, that the public is in debt, ſo that the burden of paying the debt will be leſs felt, in proportion as there are more perſons to bear a part of it; or ſuppoſe, that the ſtate is engaged in a war, or any other undertaking, the ſucceſs of which depends upon its numbers; no perſon can leave the ſociety conſiſtently with his obligations to it; unleſs he has taken care to ſatisfy the intereſt, which it has in his continuing united to it. Now if this is a true principle, if no member of a civil ſociety is at liberty to withdraw himſelf from it, where the ſociety has a particular intereſt in his not withdrawing himſelf; the conſequence is, that no member can leave the ſociety, till he has firſt obtained the conſent of the public: unleſs we maintain, that

that each member has naturally a right to judge and determine between himſelf and the public, how far it is intereſted in his ſtaying or withdrawing himſelf.

If each individual was at liberty to leave the ſtate, to which he belongs, whenever he pleaſes; civil ſociety would be nothing but a rope of ſand; it would be impoſſible for a common good to be effectually promoted, or for a common miſchief to be effectually guarded againſt. Every member of the ſociety would be at liberty either to continue in it, and endeavour to advance the general intereſt, or to leave it, in order to advance a ſeparate intereſt of his own. And in times of public diſtreſs, whoever could ſhift for himſelf would be at liberty to do ſo, though he left the other members of the ſociety to periſh for want of his aſſiſtance. But the great end of forming civil ſocieties is to promote a common good, and to guard againſt a common miſchief. Certainly therefore the nature of civil ſociety can never allow ſuch a liberty as this to its members: becauſe it is inconſiſtent with the end, which a civil ſociety propoſes to itſelf. Each particular member indeed propoſes to advance his own intereſt, to obtain his own benefit, and to guard himſelf againſt ſuch dangers, as he would be expoſed to in a ſtate of nature. But this deſign of any individual, though it is the motive, which engaged him to joyn himſelf to the ſociety, is not the meaſure of the obligation, which he is under towards it. The other individuals, who are aſſociated with him, as each of them had the ſame view for himſelf, that he had, would not have joined with him for theſe purpoſes of promoting his benefit, and of ſecuring him from violence, unleſs he would conſent to joyn with them for the like purpoſes, for the purpoſes of pro-

moting their benefit, and of ſecuring them from violence. So that if each member is conſidered in his turn as an individual joyning himſelf to ſociety, and the other members are conſidered as the ſociety, to which he joyns himſelf; the ends propoſed on each part are their reſpective benefit and ſecurity. And as theſe are the terms, upon which they aſſociate; the very act of aſſociating implys, that they agree to theſe terms, that each individual conſents to join in promoting the common intereſt, and in maintaining the common ſecurity of the reſt. The end therefore, which each propoſes, is a particular good to himſelf: but he cannot purſue this end by the help of civil ſociety, that is, the ſociety will not receive him as a member, upon any other terms, but thoſe of conſenting, and conſequently of obliging himſelf by ſuch conſent, to joyn with it in promoting a general good. Protection is the end, which he propoſes; and as the ſociety by receiving him agrees to this end, it becomes the meaſure of the ſocietys obligation towards him. Allegiance is what the ſociety expects in return; and as he by joyning himſelf to it agrees to theſe terms, they become the meaſure of his obligation towards the ſociety. But in this mutual obligation thus derived from mutual conſent, as in all other contracts, where there is no failure in performing the conditions ſtipulated on one part, it would be unjuſt not to perform the conditions ſtipulated on the other part; unleſs the parties contracting have releaſed one another by a like conſent: as long as the ſociety grants the protection, which it owes to the individual, he cannot juſtly withdraw the allegiance, which he owes to the ſociety; unleſs he has the conſent of the ſociety for ſo doing.

There is however no reaſon for maintaining in the mean time,

time, that every perſon, who is a member of any civil ſociety, muſt neceſſarily continue a member of the ſame ſociety, unleſs the public expreſsly conſents to his removal from it. Where an individual of little or no importance to the ſtate removes, and is neither ſtopped at firſt nor reclaimed afterwards; this may be looked upon as a tacit conſent; the public may be preſumed to agree to what it does not hinder. And thus far the opinion of Grotius may be admitted to be true; that though a ſingle member of no importance may thus remove in times of peace and ſecurity without the expreſs leave of the ſtate; yet no individual of great importance, nor a great number of individuals, who are made of importance by their numbers, nor any individual in times of public diſtreſs, when the ſituation of affairs makes every one of importance, can preſume upon the conſent of the ſtate, but in order to juſtify their removal they ought to have its expreſs conſent: not becauſe an inconſiderable perſon in times of peace and ſecurity has any more right to withdraw from a ſociety without its conſent, than he would have in times of public danger, or than an important perſon, or a number of perſons of any ſort would have at any time; but becauſe the conſent of the ſociety, though it is not expreſsly granted, may be more reaſonably preſumed in one caſe, than it can be in the other.

This obligation upon every individual, who is a member of any civil ſociety, not to leave it without either the expreſs or the tacit conſent of the public, is no exception to an inſtance, juſt now mentioned, of perſons freeing themſelves from lawleſs tyranny and oppreſſion by a voluntary exile: ſince the withdrawing protection on the part of the ſociety, and much more

ſuch lawleſs tyranny and oppreſſion, as is not only inconſiſtent with the notion of protection, but is directly contrary to it, muſt neceſſarily be looked upon as a diſcharge from allegiance on the part of its members. For in this contract between the members and the body, as in all other contracts of a like ſort, when one of the parties refuſe to diſcharge their part of the obligation, this is naturally a releaſe to the other party.

How far allegiance to a civil ſociety is due from its baniſhed members.

VIII. A civil ſociety, ſays [s] Grotius, has no claim of allegiance upon its baniſhed members. And certainly this muſt be true in general: becauſe the obligations, of protection on the part of the ſociety, and of allegiance on the part of its members, being mutual; whenever the ſociety judges the crimes of any one of its members to be ſuch as will diſcharge it from affording him protection any longer, and will juſtify it in forcing him to leave it, the natural conſequence of its withdrawing protection is, that ſuch member will be diſcharged from all claims of allegiance, which the ſociety had upon him. We might as reaſonably maintain on the one hand, that the public owes protection to the individual, when he has withdrawn his allegiance, as on the other hand, that the individual owes allegiance to the public, when it has withdrawn its protection. All that can be ſaid to make theſe two caſes appear different is, that if the individual is baniſhed for any crimes committed by him, the public has a juſt cauſe for putting him out of its protection; whereas, if he has left the ſociety without its conſent, he has not juſtly withdrawn his allegiance. But this difference is not at all material to the point in queſtion. If indeed we maintained, that where protection is withdrawn

[s] ibid. § XXV.

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by the ſociety, allegiance may be withdrawn by the member in the way of repriſal; it might be ſomething to the purpoſe to urge, that in the caſe of baniſhment the ſtate has a juſt cauſe for putting the member out of its protection: becauſe then it would follow, that where the ſociety has done no wrong to the individual by baniſhing him, he could not juſtly make the repriſal of withdrawing his allegiance. But this is not the way, in which his obligation to allegiance ceaſes: it ceaſes of natural conſequence: his right to protection and his obligation to allegiance correſpond to one another; and when he loſes the right, whether juſtly or unjuſtly, the correſpondent obligation is at end. However, the opinion of Grotius upon this head, though it is true in general, ought to be ſo explaned as to admit of its natural limitations. A member of civil ſociety is commonly ſaid to be baniſhed, when he is compelled to leave that part of the ſocietys territories, in which he was ſettled and had made all his connections before, and to remove to ſome diſtant and perhaps inconvenient part of them. Such a removal as this, though we uſually call it baniſhment, is not properly a baniſhment from the ſociety, but only from his own habitation: he ſtill continues within the territories, and conſequently is ſtill ſubject to the civil juriſdiction of the ſociety. So likewiſe we call the temporary removal of a man from under the protection of that ſociety, of which he is a member, by the name of baniſhment. He is ſaid to be baniſhed, if he is compelled to leave the territories for ſeven or for ten years. In the mean time the protection of the ſociety is ſuſpended, and of conſequence his allegiance muſt be ſuſpended with it. But then at the expiration of the time, his own ſtate will have the ſame claim of ſubjection upon

on him, that it would have had if he had never been baniſhed: becauſe as ſuch a baniſhment is not a final exciſion of him; the nature of it ſhews, that the ſtate intended to receive him under its protection again, and to reclaim his allegiance. But where the baniſhment is not limited to any particular time; or where it appears from the beginning to be a final exciſion of the member; the regard, which he may ſhew to the authority of ſuch ſociety, after he has left it, is merely voluntary; the hopes of being recalled may lead him, but the nature of civil ſociety will never oblige him, to pay it.

CHAP.

CHAP. III.

Of civil Power.

I. *Civil power is legiſlative or executive.* II. *Origin of civil power.* III. *Legiſlative power implys a power of altering and repealing laws.* IV. *Legiſlative power implys a power of enacting penalties.* V. *Legiſlative power implys a power of taxing the ſubjects.* VI. *Executive power is either external or internal or mixed.* VII. *Judicial power is internal executive power.* VIII. *External executive power is military power.* IX. *Appointment of magiſtrates is mixed executive power.* X. *Prerogative what.* XI. *Civil and military power how diſtinguiſhed.*

I. IF we attend to the motives, which lead men to unite into civil ſocieties, they will help to give us ſome inſight into the nature of civil power, that is, to inform us what ſort of power naturally ariſes out of ſuch an union. As men are originally led to unite themſelves into diſtinct civil ſocieties, with a view of having their ſeveral rights and duties aſcertained by a joynt or common underſtanding, and with a view likewiſe of forming a joynt or common force, ſo as to act with it for their ſecurity; we cannot ſuppoſe them to have united together, without deſigning at the ſame time to eſtabliſh ſuch powers, as would be neceſſary for obtaining theſe purpoſes, which they had in view. The natural conſequence therefore of mens forming a civil ſociety is the eſtabliſhment of a power, in ſuch ſociety, to ſettle or aſcertain, by its joynt or common underſtanding, the ſeveral rights and duties of thoſe,

Civil power is legiſlative or executive.

thoſe, who are members of it, and of a power likewiſe, to act with its joynt or common force for their defence and ſecurity. The former of theſe is called the legiſlative, the latter is called the executive power. No other powers beſides theſe are requiſite for obtaining the ends, which mankind propoſe to themſelves in forming civil ſocieties; no other powers therefore beſides theſe are neceſſary for governing ſuch ſocieties: and conſequently civil power, which we have defined to be the power, that governs a civil ſociety, conſiſts of theſe two branches and of theſe only.

Origin of civil power.

II. After what has been [t] ſaid, it will be needleſs to ſtop here and enquire from whence civil power is derived. For ſince this power, in both its branches, naturally ariſes from the eſtabliſhment of civil ſociety, the ſame conſent or agreement of mankind, by which they form themſelves into diſtinct ſocieties, muſt neceſſarily be the principle, from whence civil power is derived.

Legiſlative power implys a power of altering and of repealing laws.

III. The legiſlative power, as it is here defined, implys a power not only of making laws, but of altering and repealing them. As the circumſtances either of the ſtate itſelf or of the ſeveral individuals, which compoſe it, are changed, ſuch claims and ſuch duties, as might once be beneficial, may become uſeleſs, burdenſome, or even hurtful. If therefore the legiſlative power could not change the rules, which it preſcribes, ſo as to ſuit them to the circumſtances of the body politic, and of the members of that body; it could not anſwer the purpoſes, for which it was eſtabliſhed; it could not at all times ſettle their claims and their duties in ſuch a manner, as is moſt conducive to the good of

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the whole, and of the ſeveral individuals, which make up that whole.

IV. The legiſlative power implys farther a power of eſtabliſhing laws in ſuch a manner, as to make them effectual; that is in ſuch a manner as to ſecure the obſervance of them. For it would anſwer no purpoſe at all to ſhew men what their duty is, if they were afterwards to be left at liberty either to diſcharge or neglect it, at their own diſcretion, without apprehending any particular inconvenience to themſelves from not complying with the rules, which the common underſtanding of the ſociety has enjoyned. It is poſſible indeed, that in ſome inſtances the ſhare, which any individual might promiſe himſelf in the general good, would lead him to comply with thoſe laws, which he ſees will be productive of ſuch a good. It is poſſible too, that in ſome inſtances, where he either did not ſee the general uſefulneſs of laws, or did not apprehend, that he ſhould have any ſhare in the general good, which they produce, he might be willing to comply with them, out of a proper regard and deference to the publick underſtanding; eſpecially if he found no particular inconvenience to himſelf from ſuch compliance. But even where the laws made by the public are conducive to a general good, in which the ſeveral individuals will probably have a ſhare; many are ſo ſelfiſh, as not to be ſatisfyed with ſuch a remote and ſeemingly ſmall advantage, and are deſirous of graſping at what they think will be of greater and more imemdiate benefit to themſelves; however inconſiſtent it may be with the benefit of the public. Even where men would feel no particular inconvenience from complying with the laws, which the common underſtanding

Legiſlative power implys a power of enacting penalties.

has thought fit to eſtabliſh; many, are ſo conceited and petulant, that inſtead of obeying a law, becauſe it has been eſtabliſhed by the common underſtanding, they would look upon this as a reaſon, why they ſhould diſobey it, as far as they ſafely can.

Something farther therefore is neceſſary to ſecure the obſervance of ſuch rules, as the legiſlative power eſtabliſhes, beſides the mere eſtabliſhment of them: eſpecially ſince the advancement of the general good will frequently require not only ſuch laws to be made, as will be productive of more benefit to each individual, than he could obtain without obſerving them, or ſuch as all may obſerve without any inconvenience to themſelves; but ſuch likewiſe, as may cut off many individuals from ſome private benefit, which they might otherwiſe have obtained, in order to advance the greater benefit of other individuals and of the public in general. One method therefore of ſecuring the obſervance of laws is to eſtabliſh them under ſome penalty, the view of which may check the petulance of thoſe who would otherwiſe have tranſgreſſed them without any reaſon at all, and may give a proper turn to the ſelfiſhneſs of thoſe, who would otherwiſe have tranſgreſſed them upon reaſons of private intereſt. Whether this is the only method or not, ſhall be conſidered hereafter.

We may take this matter ſtill higher. All mankind in the liberty of nature have a promiſcuous right of puniſhing criminal actions. But thoſe, who are united in a civil ſociety, have agreed to put themſelves under the conduct of the common underſtanding, to have their duties regulated, and their rights adjuſted by the legiſlative power of that ſociety. And as this power, when it makes laws, regulates the duty of the ſeveral individuals

duals, by declaring what actions appear to the common underſtanding to be contrary to their duty, and are to be treated as crimes; ſo the ſame power, when it enacts penalties, adjuſts the right of puniſhing ſuch crimes, by declaring or appointing what puniſhment is to be inflicted on thoſe, who are guilty of them. So that the power of making laws and of enacting penalties is only one and the ſame power exerting itſelf upon different objects: in making the law it exerts itſelf in aſcertaining the rules of duty; in enacting the penalty it exerts itſelf in adjuſting the right of puniſhment.

Legiſlative power implys a power of taxing the ſubjects.

V. As it belongs to the legiſlative power of a civil ſociety to direct the ſeveral members of it what they are to do for the common good; ſo it belongs to the ſame power to direct them likewiſe what they are to give for this purpoſe; that is, the power of raiſing money to anſwer the expences, which the ſociety muſt make in its political capacity, or in purſuing the ends, for which it was formed, is a branch of the legiſlative power.

The payment of ſuch money, as theſe purpoſes require, is an obligation, which each individual lays himſelf under, when he becomes a member of civil ſociety. He tacitly agrees, by this act of becoming a member, to contribute his endeavours towards advancing and ſecuring the general good. And ſince the general good of the ſociety cannot be advanced and ſecured, nor even the ſociety itſelf be kept together, without a public revenue, this agreement binds him to pay his ſhare towards ſuch a revenue. This then is a duty of every individual, who is a member of civil ſociety. And conſequently it belongs to the legiſlative power to ſettle what ſhare each is to pay: becauſe it belongs to the legiſlative power to adjuſt and aſcertain the duties of each.

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This right of the legiſlative power over the property of the ſubjects is not a right to take the whole, or indeed any part of it, from them cauſeleſsly and arbitrarily. The preſervation of each mans property is one of the ends, which he propoſed to himſelf in entering into civil ſociety. But it is abſurd to ſuppoſe, that he would give up the whole of his property for the ſake of preſerving it. And the right, which the ſociety has, either over his perſon or over his property, is to be meaſured by what he may reaſonably be preſumed willing to give up for the ſake of obtaining thoſe ends, which he propoſed to himſelf in becoming a member of ſuch ſociety. It is indeed reaſonable to preſume, that each individual would be willing to give up a part of his property for the ſake of enjoying the reſt in peace and ſecurity. It is therefore the buſineſs of the legiſlative power to conſider and to direct what part of each mans property it is worth to have the reſt ſecured to him. Now the ſecurity, which he has in view, depends upon the preſervation and welfare of the public. And for this reaſon the legiſlative power, in ſettling what each perſon is to pay, ſhould conſider how much of each perſons property it would be worth to him to preſerve the ſtate and advance its welfare: becauſe whatever appears to the common underſtanding to be neceſſary for theſe purpoſes, is what every perſon, who belongs to the ſtate, is naturally preſumed to be willing to part with. Upon this account the burden of thoſe payments, which are called taxes, or duties and cuſtoms upon goods both moveable and immoveable, ought to be proportioned, as near as may be, to the value of each perſons property: becauſe the more a mans property is worth, the more he is naturally willing to

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pay for the ſecurity of it. From hence we may ſee the reaſon, why theſe payments are naturally made higher in times of public danger, than in times of peace and quiet: the more a mans property is expoſed to danger, and the more expence the ſociety is at in defending and ſecuring it; the more he is reaſonably bound to pay for having it ſecured.

It might perhaps be of public benefit, if the ſtate could get poſſeſſion of a private mans lands. The ſociety may want them for enlarging their roads, for erecting fortifications, or other public works of general utility. The principles here laid down will ſhew us, that the right, which the legiſlative power has in the property of individuals, will not juſtify the taking ſuch a mans lands from him, without making him amends. Such a tribute as this would not be a tax, which all the members pay in proportion to their property; it would be a payment exacted of one man for the benefit of the whole, and would therefore be contrary to the nature of civil ſociety, which requires, that the burden of all ſuch public payments ſhould be born by the ſeveral members, in proportion to the intereſt, which their property gives them in the general utility. But though the public ſhould force him to give up his land, the burden is born by all the members, if amends is made to him for it.

Some taxes or duties are paid indeed rather for the ſecurity of a mans perſon, or for the quiet enjoyment of ſome perſonal conveniences, than for the ſecurity of his property: ſuch are poll-taxes, duties upon marriages, and many others of the like ſort. But the ſame principles, with very little variation, are applicable to theſe payments. They are a part of a mans property, which he is preſumed to be willing to give to the ſociety, for

the defence of his perſon, and for the quiet enjoyment of theſe perſonal conveniences. The chief difference between theſe taxes and others is, that ſince ſuch advantages as theſe are of equal value to all, the tax, which each pays to the public for ſecuring them, may reaſonably be an equal one: whilſt other taxes, which are paid for the ſecurity of each perſons property, follow the value of that property, or are proportionable to the worth of it.

Executive power is either internal or external, or mixed.

VI. The natural uſe of the joynt ſtrength, which a civil ſociety forms, is either to preſerve the rights and enforce the duties of the members of ſuch ſociety, in reſpect of one another, and of the public; or elſe to protect the whole and the ſeveral parts of it againſt ſuch injuries, as other civil ſocieties, or other individuals, who ſtill continue in a ſtate of nature, or who are members of other civil ſocieties, might do them; to prevent ſuch injuries from proceeding, where they are begun; or to procure reparation, and inflict puniſhment, where they are completed.

Now the executive power is a power of acting with this joynt ſtrength, in order to obtain the purpoſes, for which ſuch ſtrength was formed. And conſequently the executive power is either internal or external. We may call it internal, when it is exerciſed upon objects within the ſociety; when it is employed in ſecuring the rights or enforcing the duties of the ſeveral members, in reſpect either of one another or of the ſociety itſelf. And we may call it external executive power, when it is exerciſed upon objects out of the ſociety; when it is employed in protecting either the body or the ſeveral members of it againſt external injuries, in preventing ſuch injuries from being done, or in procuring reparation or in inflicting

inflicting punishment for them, after they are done. These two branches of the executive power may, if we like these names better, be called civil and military. Civil executive power is a name, which will very well express all, that is meant by internal executive power. And the only objection, against calling external executive power by the name of military executive power, is, that something more is included in this branch of power besides what is strictly called military.

Judicial power is internal executive power

VII. Judicial power is the internal or civil branch of executive power exerting itself under such checks and controls, as the legislative power has subjected it to, in order to prevent its deviating from the purposes, for which it was formed. A legislative power without an executive one would be of no great use. It might indeed ascertain the rights and determine the duties of the subjects; but unless the common strength of the society comes in to its assistance, that is, unless the executive power interposes to support those rights and to enforce those duties, the laws might fail of obtaining their effect; it would depend upon the virtue or upon the humour of the subjects, whether they should obtain it or not. On the other hand an internal executive power, which is under no checks or controls from the legislative, would be more dangerous than useful: it must be either a brute force uninformed and unguided by any intelligent principle, or else a discretionary power in the hands of them, who are entrusted with the management of it. In the former case the wrong or the right application of it would be merely accidental; and in the latter case it would probably be oftener made use of as an instrument of private interest and undue favour, of avarice or oppression, of revenge or cruelty, than as the

means of doing juſtice to the public and to the ſeveral members of it.

But in matters of internal juriſdiction the executive power will planely appear to be ſuch an one, as is calculated to anſwer its proper purpoſes; if we conſider it as acting in this inſtance under the direction and conduct of the legiſlative. Now as the legiſlative power adjuſts and ſettles the rights of the ſeveral members of a civil ſociety, it naturally belongs to this power to determine, how far, and upon what occaſions, they ſhall have a right to the interpoſition of the common force, that is, it naturally belongs to this power to direct the uſe and extent of the internal executive power. Effectual care will be taken about the due uſe of this common force, if proviſion is made, that it ſhall not be put in motion in criminal matters, unleſs the fact to be puniſhed is firſt made evident in the eye of the law, that is, in the judgment of the public underſtanding ſpeaking by the law; and unleſs the fact, when ſo made evident, is ſuch an one as the law has declared to be puniſhable: and if a farther proviſion is made, that, after the fact is clear, and the legal guilt of it is apparent, no other uſe ſhall be made of this common force, beſides what the law allows, that is, that no other puniſhment ſhall be inflicted, but what the law has preſcribed. The like care is taken, if a like proviſion is made, in matters of claim for reſtitution or damages done; if the law does not allow the claimant to have any aſſiſtance from the common force, till his right is made evident in the ſame manner; and then allows him no farther aſſiſtance from it, than what the law has determined to be ſufficient to enforce his claim or to obtain ſatisfaction.

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We may obſerve here, that the judicial power is divided into two branches; one is called civil judicature, and the other criminal or penal judicature. The former acts with the common or joynt force of the ſociety to obtain reſtitution of what is unjuſtly witholden, or reparation for damages done. The latter acts in like manner to inflict puniſhment for the guilt of crimes committed.

The name of judicial power, which belongs to this power in both theſe branches, has probably been what leads many writers upon this ſubject to diſtinguiſh it from executive power. Having determined the notion of executive power to conſiſt in a power of uſing and applying the joynt force of a civil ſociety, they do not immediately ſee, how it could ever be called by the name of judicature; ſince judicature implies an act of the common or public underſtanding, and not a mere exerciſe of the common force. In the mean time they are aware, that judicature and legiſlation are different things, that the former is the application of ſuch laws, as are derived from the authority of the latter. And thus, as they diſtinguiſh the judicial from the executive power on the one hand, ſo they diſtinguiſh it likewiſe from the legiſlative power on the other hand. The conſequence of which has been, that they conſider the civil power as conſiſting of theſe three ſeveral parts, legiſlative, judicial, and executive. Whereas in fact the province of judicial power is planely to direct and apply, to actuate or reſtrain, the public force of the ſociety; and in this view it can be nothing elſe but a branch of the executive power. All the formalities, which precede this application of the public force, are ſo many checks and controls, which the legiſlative has fixed, to prevent

an undue application of it. Courts of judicature are the means, by which the legiſlative controls the executive. Their proceedings are ſettled by the direction of the legiſlative; and the executive acts under their direction. The name of that power, which ſuch courts exerciſe, regards them indeed as the inſtruments of the legiſlative, rather than as the principal agents of the executive; as checks of the common underſtanding upon the common force, rather than as the ſprings, which put that force in motion, and direct its application. But in whatever light the judicial power might be conſidered by them, who gave it this name; its efficacy and the uſe, that it is of to civil ſociety, ariſe from its being executive in its nature. Courts of judicature might meet, might hear cauſes, and might give ſentence upon them, as the laws direct; but theſe ſentences would be nothing, they could neither redreſs injuries nor inflict puniſhment, if ſuch courts had not either an original or a delegated power of acting with the joynt force of the ſociety to put their ſentence in execution.

External executive power or military power.

VIII. The ſecond branch of executive power, which is called external executive power, or may, if we like the name better, be called military power, is the power of acting with the common ſtrength or joynt force of the ſociety to guard againſt ſuch injuries, as threaten it from without; to obtain amends for the damages ariſing from ſuch injuries; or to inflict puniſhment upon the authors and abettors of them. The force of the ſociety, as it is employed upon theſe objects, is called its military force. And the only objection againſt calling this whole branch of the executive power by the ſame name is, what has been [u] hinted already, that this exter-

[u] § VI.

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nal branch of executive power, or rather the perſons veſted with it, are employed, not only in the actual uſe of the common force, but in regulating, abating, or ſtopping it. Thus if the ſociety is attacked or any of its rights are infringed by foreign enemies; it is the uſual province of them, who are veſted with this power, not only to make war upon ſuch enemies, but likewiſe, as the circumſtances of the caſe may require, to ſuſpend the war by a truce, or to end it by a peace. Nor is this uſually the whole of their province. As a civil ſociety may be attacked by more or by ſtronger enemies, than it can conveniently, or perhaps than it can at all, defend itſelf againſt by its own ſtrength; there is frequent occaſion to call in the aſſiſtance of others to help it. And becauſe the procuring and engaging ſuch aſſiſtance, as well as the actual uſe of it, when procured is uſually conſidered as an act of the common force; this is looked upon as a part of external executive power. Farther ſtill; as this power acts with the common force of the ſociety againſt its foreign enemies, where thoſe enemies infringe its rights, and likewiſe ſtops or ſuſpends its action, where the purpoſes of uſing it are anſwered, or are likely to be anſwered; the power of adjuſting the rights of the ſociety in reſpect of foreigners is commonly connected with external executive power, and is conſidered as a part of it. Hence it is that, when we are ſpeaking of external executive power, we are ſuppoſed to include under that head, not only what is properly called military power, but the power likewiſe of making war or peace, the power of engaging in alliances for an encreaſe of ſtrength, either to carry on war or to ſecure peace, the power of entering into treaties, and of making leagues to reſtore peace, where there has been a war, and the power

of adjuſting the rights of a nation in reſpect of navigation, trade, &c. by conventions or agreements.

However, though theſe ſeveral powers are uſually connected with external executive power by being lodged in the ſame hands, they are not naturally eſſential parts of it. Theſe ſeveral powers are rather acts of the common underſtanding, than of the common force; and therefore ſeem, in their own nature, to be parts rather of the legiſlative than the executive power. But where the legiſlative and the executive power are lodged in different hands, and eſpecially in thoſe civil ſocieties, where the former of theſe powers reſides in the whole body, or in a conſiderable number of repreſentatives; the uſual practice is to allow ſome degree of diſcretionary power in reſpect of war or peace to him or to them, who are entruſted with the right of putting the military force in motion; eſpecially in thoſe inſtances where the legiſlative body cannot act with ſuch readineſs and expedition, as the occaſions or opportunities of war require. And ſince war is the means, by which, in the laſt reſult, all the rights of the ſociety in reſpect of foreigners muſt be defended and maintained; it is uſually thought convenient that thoſe rights ſhould in ſome meaſure be under the inſpection and management of the ſame perſon or perſons, who are employed in looking after and managing the occaſions and opportunities of war. So that where the public underſtanding cannot direct by ſettled rules, which have been eſtabliſhed beforehand, but muſt act if it acts at all, as occaſion offers, and particularly where this public underſtanding is the joynt ſentiment of a great number of men, and cannot for that reaſon be collected or made known on a ſudden; in theſe caſes and in others, which

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are naturally connected with them, it has in moſt civil ſocieties been thought convenient to allow thoſe a diſcretionary power of acting, who have the external executive power, or to ſubſtitute their judgment in the place of the public underſtanding.

This however, though it may be convenient, is not neceſſary: for the legiſlative body, where no poſitive law of the conſtitution forbids it, may appoint its own agents, diſtinct from thoſe, who actuate the common force: it may naturally not only make war or peace by its own authority, but may ſend its deputies along with the army to control its operations even in war. Except indeed in the heat of action; where, unleſs there is a diſcretionary power lodged in the hands of thoſe, who have the military command, it would be impoſſible for them to do their duty. If the right of doing this is naturally implyed in the notion of a public or common underſtanding formed for the purpoſe of directing a civil ſociety; that is, if a right to direct ſuch affairs, as relate to external juriſdiction, is naturally implyed in the notion of legiſlative power; the conſequence is, that in thoſe particular civil ſocieties, where by the conſtitution of government they, who are entruſted with the external executive power, act in any inſtance of external juriſdiction at their own diſcretion without any immediate control from the legiſlative, this diſcretionary power muſt be conſidered as originally connected with the legiſlative: it muſt be ſo conſidered in this ſenſe at leaſt, that though the fundamental laws of the conſtitution may make it unconſtitutional in after times for the legiſlative body to take this power to themſelves, yet there was from the beginning no natural reaſon, or no reaſon drawn from the nature of

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civil ſociety or of civil power, againſt their preventing any ſuch diſcretionary power from being eſtabliſhed by general conſent, or from eſtabliſhing itſelf afterwards by long uſage and cuſtom.

In ſhort, the external executive power, in its own nature, is no more an independent power of acting without being controlled by the legiſlative, than the internal executive power is. Even in thoſe civil ſocieties, where the particular conſtitution has left this power diſcretionary in ſome inſtances, it does not ſuffer it to be ſo in all. And by the checks, to which it is ſubject, in other inſtances, we are naturally led to judge, that, if the poſitive will or appointment of the legiſlative power, conſidered as acting originally in modelling the civil conſtitution, had not from the beginning eſtabliſhed the contrary, it would have been ſubject to the like checks in all.

Theſe checks appear principally in thoſe inſtances, where, without any great inconvenience to the ſociety, the external executive power may be directed by general and ſtanding laws, or rather in thoſe inſtances, where it could not without great inconvenience be left independent. Thus the legiſlative power, notwithſtanding the executive is in ſome other reſpects left independent, determines what number of the members of the ſociety ſhall be armed in order to join their force for repelling or ſubduing its external enemies. It determines to what laws or to what ſort of military diſcipline they ſhall be ſubject, who are thus armed. It determines in what manner they ſhall be maintained or paid, in order to make them amends for giving up other employments and engaging in this, to which, as members of the ſociety, they were no more obliged than the other members.

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in alliances, leagues, or conventions, if they bind any of the members to give up their private claims, or to do any thing, which is inconſiſtent with the civil laws then in being, its authority makes them void of courſe, unleſs it interpoſes to eſtabliſh them. In particular, if ſuch agreements cannot be made good without money to be raiſed by a tax upon the property of individuals; if new duties are to be impoſed upon any commodities, or duties eſtabliſhed already are to be aboliſhed; ſuch agreements are not valid by any diſcretionary act of the executive power, but may either be made void or confirmed by the legiſlative. Theſe are planely natural checks of the legiſlative power upon the executive, and are ſufficient to ſhew, that the latter is not a diſcretionary power, but is in itſelf under the control of the former. So that wherever it is otherwiſe, in whatever nation we find a diſcretionary executive independent in any inſtances upon the legiſlative, we may conclude that it owes this independency to civil conſtitution or poſitive appointment, and does not derive it from its own nature.

Appointment of magiſtrates mixed executive power.

IX. By magiſtrates I would here be underſtood to mean ſuch perſons in a civil ſociety, as put the common force of it in motion, or act with that common force. I uſe the word therefore in a more extenſive ſenſe, than it is commonly uſed, to mean not only ſuch perſons, as act with the common force in the judicial or internal branch of the executive, but ſuch perſons likewiſe, as act with that force in the military or external branch. The name of magiſtrate in the uſual ſenſe of the word, is appropriated to the former: the latter are generally called officers, where the executive power is purely military, and ambaſſadors, miniſters, envoys, &c, in the

the reſt of that branch of the executive power, which is external. According to this notion of magiſtrates, they are the agents of the executive power; and conſequently the appointment of them belongs to this power. But becauſe their province is partly internal and partly external, the power of appointing them belongs partly to one branch of the executive and partly to the other; ſo that it may not be improper to call this mixed executive power.

It is neceſſary however to take notice of a difference between internal and external magiſtrates. The judicial power, which belongs to internal magiſtrates, is under the conſtant and ſteady control of the legiſlative; their power of acting with the public force is regulated and limited by ſtanding laws. And conſequently the nature of their juriſdiction is defined or ſettled by the legiſlative; though the power of exerciſing ſuch juriſdiction is derived from the executive: it ſo far belongs to the legiſlative to erect or appoint courts of judicature, as to appoint, that magiſtrates with this or that particular power may or ſhall be erected; notwithſtanding the perſons themſelves are choſen or nominated, and the powers, which they exerciſe, are derived from the executive. This would be the caſe likewiſe of external magiſtrates, ſuppoſing this branch of the executive power to be under the like uniform control of the legiſlative. But in moſt civil ſocieties, where the legiſlative and executive are in different hands, the conſtitution leaves the latter in ſome inſtances a diſcretionary power, as to the external branch of it. And for this reaſon ſuch magiſtrates, as have their province in this branch, not only derive their power from the executive, but are likewiſe under the regulation of the

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executive, as to the degree or extent of their power. Grotius divides civil power into the five following parts; firſt the power of making, altering, or repealing laws, both ſuch as concern ſacred, and ſuch as concern other matters, as far as the former relate to or affect the ſtate. Secondly the power of making war or peace, of engaging in treaties, leagues, alliances, or conventions. Thirdly the power of eſtabliſhing taxes, cuſtoms, or duties to be paid out of the property of individuals for the public uſe and ſervice. Fourthly, the power of hearing and effectually determining all matters of controverſy, which ariſe between individuals. And fifthly the power of appointing magiſtrates, ambaſſadors, or other officers. Though I have not kept to this diviſion, the reader will be able to ſee, without much trouble, that all theſe ſeveral parts of civil power have been taken notice of, and been reduced to one of the two general heads, into which I have divided it; they are all of them branches either of the legiſlative or of the executive.

Prerogative what.

X. If we continue to ſpeak of the legiſlative and executive power in the abſtract; it will be difficult to explane rightly, what is meant by prerogative. It cannot properly be called diſcretionary executive power; becauſe the executive power in the nature of the thing is not diſcretionary in any part: wherever it acts at diſcretion, this privilege, unleſs it ariſes from the neceſſity of the caſe, as in the heat of military action, comes from the legiſlative either by original eſtabliſhment, or by long uſage and cuſtom, or by occaſional permiſſion. We ſhall be better able to underſtand what prerogative is, if we ſpeak of the legiſlative and

* L. I. C. III. § VI.

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executive power, not in the abſtract, but as lodged or entruſted by the ſtate in the hands of ſome one or more perſons. Where the perſon, ſo entruſted with the executive power, is left by the legiſlative to act in any inſtances, at his own diſcretion, to direct by his own underſtanding the public force, which is naturally under the direction of the public underſtanding, ſuch a diſcretionary power in him is called prerogative. Thus in penal caſes, if the legiſlative forbids the public force to be put in motion for the puniſhment of any action, till the fact itſelf is proved to the public underſtanding in ſuch a manner as the law appoints, and then will not ſuffer this force to be uſed but under the conduct of the law, ſo as to inflict only the legal penalty; thus far there is no prerogative or no diſcretionary power in him, who is entruſted with the executive. But then if the legiſlative, inſtead of reſerving to itſelf the right of judging, whether ſuch legal puniſhment is to be ſuſpended, or whether the criminal is to be wholly pardoned, leaves it to him to pardon or not, as he thinks proper, ſuch a diſcretionary power entruſted with him is called prerogative. In caſes of external juriſdiction; if the ſociety makes war or peace, as he thinks convenient, if it is bound by ſuch leagues or conventions, as he engages it in; if its military force, when appointed and eſtabliſhed, is under his command, and is to act as he directs; theſe are inſtances of a diſcretionary power: and where the perſon entruſted with the executive has ſuch a diſcretionary power, it is called prerogative. If he, who is entruſted with the executive, has a diſcretionary power of calling the public together to act in its legiſlative capacity, or of calling the repreſentatives of the public together, where it acts

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in this capacity by its repreſentatives; or if it is left to him to appoint the time and place of its meeting; this, though it is not properly any branch of executive power, yet if it is ſo entruſted with him, who has the executive power, will come under the notion of prerogative. But ſhould the legiſlative ever have limited him in this reſpect, and tyed him down to call them together at any particular time or place; ſo far this prerogative is at an end; and the act of calling them together, though it might once be an act of prerogative, and ſo may ſtill retain the name, becomes in its nature miniſterial.

We may from hence learn, that in thoſe nations, in which there is any ſtruggle between the legiſlative body and the perſon or perſons, who are entruſted with the executive power, this is not a ſtruggle between the legiſlative and the executive powers. The provinces of theſe two powers conſidered abſtractedly, or as they are in themſelves, are marked out diſtinctly enough for any one to ſee their reſpective limits. It belongs to the legiſlative power, conſidered as the common underſtanding, or joynt ſenſe of the body politic, to determine and direct what is right to be done: and it belongs to the executive power, conſidered as the common or joynt ſtrength of the ſame body, to carry what is ſo determined and directed into execution. But in thoſe particular civil ſocieties, where the legiſlative and executive power are lodged in different hands, it is uſual, eſpecially if the legiſlative body is a large one, to allow thoſe, who have the executive power, to act diſcretionally in ſome caſes, that is, it is uſual for them to have in ſome inſtances ſuch a diſcretionary power as is called prerogative. And the only ſubject of diſpute about

prerogative

prerogative, that can be intelligible, is between the executive body and the legiſlative body, concerning the inſtances, where this diſcretionary power takes place, or elſe concerning the extent of it in ſome particular inſtance; that is, they may poſſibly diſpute, either how far, in ſettling the conſtitution of government, ſuch power of acting at diſcretion, veſted in the executive body, was deſigned to extend, or how far it may be proper and convenient for the public, that it ſhould extend.

The reader may perhaps have met with ſome difficulties in this chapter for want of having attended to a neceſſary diſtinction between the legiſlative power of civil ſociety in general, and the legiſlative body of any particular ſociety, and to a like diſtinction between the executive power and the perſon or perſons, with whom ſuch power is entruſted. The following chapter is the place, in which the ſubject will lead us to explane this diſtinction. And when it is explaned, ſome paſſages in this, which may have appeared difficult, will probably be better underſtood.

Civil and military force how diſtinguiſhed.

XI. The force of a body politic, as it is employed in matters of internal juriſdiction, is called the civil force; and as it is employed in matters of external juriſdiction, it is called the military force. The civil force is what the judicial or internal executive power acts with; and the military force is what the external or military executive power acts with. Theſe two forces therefore, though they may appear to be the ſame, when they are conſidered only as the joynt force of the ſame body politic, are diſtinct from one another in reſpect of their objects. The civil force is employed in putting the laws in execution, that is, in maintaining and ſupporting within the ſociety what is right in civil matters,

matters, or in inflicting punishment in those, which though they are of a civil nature are distinguished by the name of criminal matters. The military force is employed in defending the society and its several members against injuries from without.

This, which is a distinction between these two forces in respect only of their objects, leads us to a distinction, which may, in some societies be made between the forces themselves; when we consider one of them as the force, with which the internal executive power acts, and the other as the force, with which the external executive power acts. For the internal executive power is under the constant and uniform control of the legislative: whereas in most civil societies there is something of a discretionary power joyned with the external executive. The consequence of which is, that the civil force, or force employed to maintain justice within the society, is under the same control with the internal executive power: but the military force, or force employed against injuries from without, may in some instances be a discretionary force, not guided so much by the legislative body, as by the judgment of them, who are entrusted to act with it.

If the constitution of government has introduced such a distinction in fact; that is, if the military force is actuated by a discretionary power; there is an evident reason, why this force does not it its own right come in, where only the members of the society are concerned, in order to carry the laws into execution: because the force employed for this purpose ought to be such an one, as is under the checks and control of the laws, and not such an one, as in any respect acts at discretion.

The force indeed, which the ſociety eſtabliſhes to carry the laws into execution, is commonly a ſmall one. What is done in this particular is conſidered as done by the joynt force of the whole, though the whole, inſtead of riſing for this purpoſe, acts by ſuch civil officers, as the public underſtanding has thought ſufficient. Theſe are commonly but few; becauſe few are ſufficient to give a perſon poſſeſſion of ſuch rights, as the law has adjudged to him, or to inflict puniſhment after a legal ſentence. However, if this ſmall force is found inſufficient, theſe civil officers uſually call in any of the members of the ſociety to their aſſiſtance in order to encreaſe their force. They ſometimes call in the aſſiſtance even of the military force: upon which occaſion it is conſidered, not as the military force, or not as having in any reſpect a diſcretionary power, but as a part of the civil force acting under the direction of the civil magiſtrate. So that perhaps it might be more proper to ſay, that the civil magiſtrate upon ſome occaſions, where he apprehends the uſual force employed by him to be too weak to anſwer his purpoſe, calls in the ſoldiery to his aſſiſtance; than that he calls in the military force. The perſons, which are uſually employed by him are either too few or too unſkilful to withſtand the reſiſtance which he is likely to meet with. Therefore as there are many members of the ſociety, who are the inſtruments of the external executive power, and who are trained up to oppoſe ſuch violent reſiſtances, as frequently come from without; he has recourſe to them, and uſes them as his inſtruments, ſubject, when they are ſo called in by him, to his control, and conſequently ſubject, as he is himſelf, to the control of the law.

CHAP.

CHAP. IV.

Of the different forms of civil government.

I. *Sovereign and ſupreme power what.* II. *Legiſlative and executive power compared.* III. *Civil conſtitution what.* IV. *Origin of civil conſtitutions in reſpect of the legiſlative.* V. *How a civil conſtitution becomes fixed, as to the legiſlative.* VI. *Executive body how formed.* VII. *Deſpotic conſtitution how produced.* VIII. *Executive body how fixed.* IX. *National conſtitution a queſtion of fact.* X. *Monarchical conſtitutions not more natural than others.* XI. *Monarchical conſtitutions not impoſſible.* XII. *Conſtitutions not neceſſarily democratical.* XIII. *Titles or appearances do not determine the nature of a conſtitution.* XIV. *Tenure of civil power to be diſtinguiſhed from the power itſelf.* XV. *Promiſe or oath of a king may limit his power.* XVI. *Mixed conſtitutions.* XVII. *Civil conſtitutions may be altered.*

I. WHEN we ſpeak of ſovereign power or of ſupreme power, we are led into ſome miſtakes, by uſing theſe words indiſcriminately. When we call any power ſupreme, the expreſſion ſeems to be relative to ſome other ſubordinate powers: to call any power the higheſt of all is not very intelligible; if there are no other powers below it. Sovereign power is likewiſe a relative term; but then it has not a neceſſary relation to ſubordinate powers. To call any power by the name of ſovereign power does not neceſſarily imply, that there are any other powers in ſubordination to it. Whatever power is independent, ſo as not to be ſubject to any

Sovereign and ſupreme power what.

other power, though it has in the mean time no other power ſubject to itſelf, may with propriety enough be called by this name. In ſhort, that power may well be called ſovereign, to which none is ſuperiour: whereas none can be called ſupreme, unleſs there are others inferiour to it.

[a] Grotius indeed has not obſerved this diſtinction: he defines ſupreme power, as I ſhould define ſovereign power, to be ſuch an independent power of governing a civil ſociety, that no acts, which are done by it, can be made void by any other human power. In this ſenſe every ſtate, in reference to all other ſtates, has ſupreme, or, as we might better call it, ſovereign power within itſelf: it governs itſelf independently, and no other ſtate has authority to make its acts of government void. A ſociety of men, by whatever ties and for whatever purpoſes they may be united to one another, is not complete in itſelf; if it has not within itſelf, an independent power of government, but is, either in its legiſlative or in its executive, ſubject to be controled by any power from without. Such a ſociety therefore, though formed for civil purpoſes, is no civil ſociety; it can at beſt be only a part of ſome other ſtate, and is uſually called a province to that ſtate in particular, from which it receives its laws, or by which its public force is put in motion and made to act.

Every individual in the liberty of nature is his own maſter, and has an independent or ſovereign power over himſelf. The conſequence of which is, that when a number of ſuch individuals are united together, ſo as to form a ſociety, this ſociety is naturally its own maſter, and has an independent or ſovereign power

[a] L. I. C. III. § VII.

over

over itſelf. Since no perſon, and no collection of perſons, out of the ſociety, has naturally any authority over any individual within it; the conſequence is, that no other civil ſociety can have any authority over a body politic made up of ſuch individuals.

If indeed any one body politic has conſented to ſubmit itſelf to the authority of any other body of the ſame ſort; it ceaſes to be its own maſter, it has no longer an independent or ſovereign power of its own. [b] But then it ceaſes at the ſame time to be a ſtate and becomes a province. No aſſembly of men is called a ſtate, unleſs it is complete in itſelf: and no aſſembly of men united for the purpoſes of advancing a common utility and of ſecuring their rights can be complete; if it has not within itſelf whatever is neceſſary to anſwer thoſe purpoſes; if, inſtead of having a legiſlative and an executive power of its own, it is obliged to have recourſe to ſome other ſociety or aſſembly of men to aſcertain the rights and to preſcribe the duties of its members, or to maintain thoſe rights, when they are aſcertained, and to enforce the obſervance of thoſe duties, when they are preſcribed.

Legiſlative and executive power compared.

II. The not having attended to the diſtinction, already taken notice of between the notions of ſovereign and ſupreme power, and the promiſcuous uſe of theſe two words, may poſſibly have been one occaſion of a ſeeming difference in opinion between thoſe, who, if they were to explane their meaning, might poſſibly be found to agree. The executive power in any ſtate may undoubtedly be called ſovereign power: becauſe, in reference to all other ſtates, it is an independent power.

[b] Grot. ibid.

It is not naturally ſubject to the reſtraint, or to the direction of any power out of the ſociety. Where it is ſubject to any ſuch external reſtraint, there is no ſtate, but a province only, a part or member of ſome other ſociety. Now as the terms ſovereign and ſupreme power are uſed indiſcriminately; we are apt to conclude, that the executive, becauſe it may in this ſenſe be called ſovereign power, is likewiſe to be conſidered as ſupreme power. But then the enquiries upon this head are uſually carryed ſomething farther. The legiſlative and the executive power in the ſame ſociety are ſometimes compared together: and then the queſtion is, which of theſe two is to be looked upon as the ſupreme power. It is not uncommon to imagine here, that executive power, becauſe it is called ſovereign, and is therefore looked upon as ſupreme in one reference or compariſon, may likewiſe be called ſovereign, and be looked upon as ſupreme in this other reference; ſo that if the legiſlative power is not ſubordinate to it, they muſt at leaſt be independent one of the other.

The diſtinction of the two names ſovereign and ſupreme, if it was attended to, would correct this falſe concluſion. The executive power of any one civil ſociety in reference to the civil powers, either legiſlative or executive of any other civil ſocieties may indeed be called ſovereign power: becauſe it is independent of them, and does not act under their direction. But then in this reference it is not very proper to call it ſupreme power; becauſe though ſuch foreign powers cannot of right direct or control it, yet they are not ſubordinate to it. And if, by proving the executive power, of any particular ſociety, to be ſovereign power in this reference, it does not follow, that it is to be called ſupreme power

power in the ſame reference; much leſs will it follow, that we are to look upon it as ſupreme power in reference to the legiſlative of the ſame ſociety.

Indeed there is in almoſt every ſtate what may be called ſupreme executive power, in reference to ſome other powers within the ſtate itſelf. When an executive body is fixed by the conſtitution of government in any civil ſociety; whether this body conſiſts of one perſon or more; there are uſually many other ſubordinate perſons, or bodies, who have ſuch a derivative and inferiour juriſdiction, as commits the public ſtrength of the ſociety to their management in many inſtances. Theſe inferiour magiſtrates therefore have an executive power: but as it is derived from the perſon or perſons, with whom the executive is originally entruſted; this power is inferiour or ſubordinate to his: and in this reference his executive power may be called ſupreme. But this again is no evidence, that the executive power, either in itſelf, or as it is entruſted in his hands, is ſuperiour to the legiſlative or even independent of it. There can certainly be no ground for concluding, that the executive power in his hands is ſupreme, when compared with the legiſlative; only becauſe it is ſupreme, when compared with the executive power in other hands.

If we conſider the nature of theſe two powers, there will be no great difficulty in judging, which of them is ſupreme, when they are compared with one another. The legiſlative is the joynt underſtanding of the ſociety directing what is proper to be done, and is therefore naturally ſuperiour to the executive, which is the joynt ſtrength of the ſociety exerting itſelf in taking care, that what is ſo directed ſhall be done.

As legiſlative power is thus found to be ſuperiour to executive, when they are conſidered in the abſtract; we are apt to conclude two haſtily, that in every civil ſociety the legiſlative body is in all inſtances ſuperiour to the executive body. Whereas in fact the conſtitution of government may in ſome inſtances have lodged [c] a diſcretionary power in the executive body: ſo that though in general the public underſtanding ſpeaks by the legiſlative body, yet in theſe inſtances the underſtanding of the executive body may be deſigned to ſtand in the place of the public underſtanding, and to direct what is to be done as well as to ſee to the doing of it. For the exiſtence of a legiſlative body is not wholly inconſiſtent with the notion of prerogative.

Civil conſtitution what.

III. By the civil conſtitution of government in any nation is meant the eſtabliſhed form of exerciſing the ſupreme or governing power within that nation, which we have juſt now proved to be the legiſlative power of it. The ſimple conſtitutions of government are commonly reduced to theſe three, monarchy, ariſtocracy, and democracy: by which we are to underſtand, that there are three different ſorts of legiſlative bodies; any of which may be eſtabliſhed in any nation; and each of which may be called ſimple, becauſe each of them is uniform or alike in all its parts. The conſtitution is democratical, when the legiſlative power is exerciſed either by the collective body of the people, or by repreſentatives, which they chuſe from time to time. It is ariſtocratical, when this power is exerciſed by the nobles, that is, by a ſmall and ſelect body of men, who after their original deſignation to this office are elective no longer, but tranſmit their power to their heirs or to other

[c] See C. III. § X.

eſtabliſhed

eſtabliſhed ſucceſſors. It is monarchical, when this power is exerciſed by a king, that is, by a ſingle man; whether upon his demiſe it is tranſmitted to his heirs, or to other eſtabliſhed ſucceſſors, or to ſuch ſucceſſors, as ſhall upon that event be choſen. We cannot indeed properly ſay, that in this laſt form of government all the parts of the legiſlative body are alike; becauſe the whole body conſiſts of only one perſon: the form however is a ſimple one; becauſe there is no mixture or diverſity of parts in it.

The conſtitution of government is called a mixed one, when two or more of theſe ſimple forms are compounded, or joyned with one another. Thus the legiſlative body may conſiſt either of the whole body, or of a repreſentative body of the nobles and of the people; or of the king and the people; or of the king and the nobles alone; or of the king, and the nobles, with the repreſentatives of the people.

The mixture in this laſt form will be a little varyed, if the king is entruſted with the executive power in ſuch a manner as to have any prerogative joyned with it: or if the repreſentatives of the people claim a right of eſtabliſhing any ſort of laws, whether relating to the public revenue or to any other matter, and the conſent of the other two parts of the legiſlative body to ſuch laws is conſidered as a thing of courſe, which they are not to refuſe. In either of theſe caſes the form is ſtill a mixed or compound one, though the compoſition is not quite the ſame. In the former caſe it approaches towards monarchical, and in the latter towards democratical.

IV. When a number of perſons, who are equal to one another, that is, who are free, [d] as all men naturally are free, from any juriſdiction or authority over one another,

Origin of civil conſtitutions, in reſpect of the legiſlative.

[d] See B. I. C. X. § III.

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IV. When a number of perſons, who are equal to one another, that is, who are free, [d] as all men naturally are free, from any juriſdiction or authority over one another,

Origin of civil conſtitutions, in reſpect of the legiſlative.

[d] See B. I. C. X. § III.

another, have united themſelves into a civil ſociety; the natural reſult of ſuch an union is a legiſlative power. But then there is originally no legiſlative body diſtinct from the collective body of the ſociety. [e] All and each are obliged to conform themſelves to whatever the whole or the major part ſhall agree upon: but as no one perſon, nor any ſelect number of perſons, can have any right to preſcribe to the reſt; ſo neither is this collective body of men naturally obliged to elect or ſettle a number of repreſentatives, who ſhall have authority to act for them, or to determine what is to be done and what to be avoided. Each member of the ſociety has originally a right to act for himſelf, as a member, that is, to deliberate with the reſt, and to give his ſuffrage upon ſuch points as come before them. It is neceſſary therefore to look farther than the compact, by which men unite themſelves into a civil ſociety, in order to find out the origin of any other civil conſtitution of government, beſides ſuch an one as is popular or democratical in the fulleſt extent of that word.

There is indeed an original [f] legiſlative power in every civil ſociety; but ſome farther act is neceſſary, beſides the mere union into ſuch a ſociety, before this power can be naturally veſted in any one part of the ſociety excluſive of the reſt; before a king, or the nobles, can have a right of making laws, which ſhall bind the whole; or before the people ſhall be obliged to act by repreſentatives, or to be concluded by the ſenſe of any part of the ſociety, inſtead of acting in their collective capacity, ſo as to be concluded by nothing leſs than the general ſenſe of the collective body. All men, be-

[e] See B. II. C. I. §II. [f] See B. II. C. III. §I.

fore

fore they are conſidered as members of a civil ſociety, are equal to one another, and are likewiſe independent of one another; each has naturally a right to think and to act for himſelf. This independency is in ſome meaſure limited by their entering into civil ſociety. If there is no expreſs agreement, yet the very act of entering into ſuch ſociety is a tacit agreement, which makes them ſo far dependent upon the general ſenſe and will of the whole body politic, that they are from thence obliged to conform themſelves to that general ſenſe and will. But if they are conſidered merely as members of a civil ſociety; if nothing more is ſuppoſed to have paſſed, beſides that agreement, either expreſs or tacit, by which they united themſelves into ſuch a ſociety; they would ſtill have a civil equality: this union, though it has produced a legiſlative power, has not lodged it in any particular hands; it leaves each member as free to act for himſelf in a civil capacity, as he before was in a natural capacity. From hence then it follows, that the obligation of being ſubject to a legiſlative power in any one man, or in any body of men, though this body is within the ſociety, if it is different from the whole collective body, is a farther abridgment of natural liberty, than what ariſes merely from the agreement, by which mankind unite themſelves into civil ſocieties. But every abridgement of liberty, which is made without our conſent, either expreſs or implyed, is contrary to the law of nature. No civil conſtitution of government therefore, which is not purely democratical, can be eſtabliſhed conſiſtently with the law of nature, without a farther agreement between thoſe, who are members of the ſame civil ſociety: we may indeed ſay, that without ſuch an agreement no conſtitution of government, that we know of,

or

or read of, could have been formed: becauſe there does not appear ever to have been any conſtitution ſo entirely democratical, as to allow every member an equal ſuffrage in all matters of legiſlative power. In the moſt popular forms of government, perſons of no fortune, women, and ſuch as are in their civil minority, whether they are in their natural minority or not, are uſually excluded from having any ſhare in the exerciſe of the legiſlative power.

There is no great difficulty in conceiving, that no ſingle perſon can claim the legiſlative power in a civil ſociety, in conſequence of that compact only, by which the ſeveral members united themſelves into one body, with a view of preſerving their rights and of advancing a general good. An excluſive legiſlative power in a king muſt planely be the effect of ſome farther compact. Nor is it more difficult to underſtand, that there cannot without ſuch farther compact be any ſuch thing, as an ariſtocratical conſtitution of government. There is not naturally in any civil ſociety, merely as a civil ſociety, any ſelect and ſtanding body of men with an excluſive legiſlative power. Whenever a power of this ſort is lodged in ſuch a legiſlative body, it muſt, in order to be conſiſtent with the natural rights of mankind, have been lodged there by ſome other act, beſides the original agreement, upon which the ſociety was formed. The neceſſity of ſuppoſing ſuch a ſubſequent act is not ſo apparent in democratical conſtitutions. But yet it will, upon enquiry, be found neceſſary to ſuppoſe ſuch a compact; if we conſider what conſtitutions are called democratical. In many conſtitutions, which are ſo called, the legiſlative power is veſted in the repreſentatives of the

the people, and is not exerciſed by the collective body. Here then we planely find another compact beſides that, which formed the ſociety: at leaſt we find an act of electing ſuch a repreſentative body and of delegating the legiſlative power to it: which act is different from the original compact, that joyns the ſeveral individuals into one civil ſociety. Suppoſe, that each member of this repreſentative body is choſen for life, and that upon every vacancy, by the death of any member, the collective body has the right of filling up ſuch vacancy: we may aſk on the one hand, how each member came to have a right to make a part of the repreſentative body, as long as he lives? that is, why the collective body has not a right of diſplacing him, ſo as to make a vacancy, till he dies? It will be impoſſible to ſhew, that he has any ſuch claim, againſt the collective body, from the nature of civil ſociety, without having recourſe to ſome farther act, beſides that, which formed the ſociety by uniting the ſeveral members of it into one collective body: and this farther act I have here called a compact. If there had been no ſuch compact or ſettlement; no reaſon can be aſſigned from the mere nature of ſociety, why the legiſlative power ſhould be veſted in the repreſentatives of the people, rather than be exerciſed by the collective body; or why, if ſuch repreſentatives are once choſen, they ſhould continue for life, rather than for a certain number of years, or rather than during the pleaſure of their conſtituents. Suppoſe again, that the legiſlative power is veſted in repreſentatives choſen for a certain term of years; this is ſo far from being a form of government, which ariſes immediately from the nature of civil ſociety, or from the original compact, by which

ſuch

ſuch ſocieties were formed, without the aid of any farther agreement, conſent, or compact, that a form of government of this ſort would be precarious; it could in its own nature laſt no longer, than during the term of years, for which the appointment of the repreſentatives was made, but muſt upon the expiration of this term be continually renewed by ſuch conſent or compact. For when the term is expired, for which the repreſentative body with legiſlative power was choſen; the legiſlative power would naturally return to the collective body, in which it was originally veſted. And this collective body would then be at liberty to act, as they pleaſe, in regard to the future exerciſe of that power. The people in general might either keep it and exerciſe it themſelves; or they might chuſe a repreſentative body, which ſhould continue, either for the ſame, or for a different term of years, or during the lives of each repreſentative member; or they might appoint a body of nobility, and give legiſlative power to them and their heirs, or to them and ſuch ſucceſſors as ſhould be then ſettled; or laſtly they might delegate the legiſlative power to one ſingle perſon, and ſo introduce a monarchical conſtitution.

Even in conſtitutions, which approach as near as any, that we know of, to perfect democracies, ſome farther compact, beſides that, which formed the ſociety, muſt be underſtood to have intervened in order to ſettle the legiſlative body. The nature of civil ſociety does not exclude women from having a ſuffrage in making laws; that is, it does not exclude them from being a part of the legiſlative body. If from obſerving either our own manner of chuſing repreſentatives, or the manner of making laws in other forms of government, where the people

people act in a ſeemingly collective body, and not by their repreſentatives, we have been led to imagine, that women are by the nature of civil ſociety excluded from a ſhare in the legiſlative; we may correct this notion by conſidering, that [z] women, as well as men, have a natural right to their liberty, before they join themſelves to civil ſociety, and have, as well as men, a right to act as members of ſuch ſociety, after they have ſo joyned themſelves to it. The conſequence of which is, that till ſome act of the ſociety, ſubſequent to the forming of it, has by general conſent excluded women from a right of ſuffrage, they might naturally claim it. But perhaps the reader may be more readily led to correct his miſtake, if we only aſk him, whether he has never heard of a queen upon the throne, in thoſe countries, where, by being ſeated there, ſhe has a ſhare in the legiſlative power or makes a part of the legiſlative body? No civil laws, no civil conſtitution of government could give, or even allow, ſuch a power, as this, to a woman; if it was contrary to the nature of civil ſociety for a woman to have a ſhare in matters of legiſlation. If then the reader, from ſuch facts as theſe, is informed, that it is not contrary to the nature of civil ſociety for women to have a ſhare in the exerciſe of legiſlative power; we may next aſk him, by what means it comes to paſs, that, in the moſt popular forms of government, they ſhould not be conſidered as a part of the collective body in the buſineſs of legiſlation? Nothing but compact or agreement can have juſtly excluded them. If therefore, when the people are ſuppoſed to act in their collective body, whilſt they exerciſe legiſlative power, the women, who are members of the ſociety, make no part

[z] See B. I. C. X. § III.

of

of that collective body; even ſuch a democratical conſtitution as this muſt have been ſettled by ſome farther agreement, and did not naturally or neceſſarily ariſe out of that compact, by which the ſociety was formed. What we have ſaid of women may, without much variation, be applyed to perſons, who are [b] naturally at years of diſcretion, but yet are excluded from the right of voting in matters of legiſlation, even in the moſt popular forms of government, becauſe they are not arrived at that period of life, which the civil laws of the country have fixed as the limit of minority. It will, I know, be thought a very obvious anſwer to this difficulty, to ſay, that the laws have excluded them. But this anſwer does not take the matter up high enough: for we are not enquiring how they came to be excluded, after a legiſlative body was formed, in which they have no ſhare; but how ſuch a legiſlative body came to be formed at all. Allow me only, that, till ſuch laws, as exclude them, were made, they had a right of ſuffrage, as parts of the collective body; and this conceſſion will be enough for my purpoſe. For if they are not excluded from ſuch a right by the nature of civil ſociety, the conſequence is, that they never could have been juſtly excluded at all, if there had been no compact or agreement of the whole collective body, by which they were excluded. The ſame ſort of reaſoning is ſtill farther applicable to perſons, who are in their own power, that is, who are not ſlaves, and yet are not conſidered in the moſt popular forms of government, as parts of the collective body, only becauſe they are poſſeſſed of little or of no land within the territories. The [c] nature of civil ſociety does not exclude ſuch perſons from being parts of the collective

[b] See B. I. C. XI. § VIII. [c] See B. I. C. I. § XI.

lective body. If therefore they are excluded in the moſt popular forms of government; even ſuch popular forms muſt have owed their eſtabliſhment to ſome farther act, and cannot have immediately ariſen out of the compact, by which men are conſidered as uniting themſelves into civil ſociety.

I have been the more particular in explaning this matter, becauſe it does not ſeem to have been well attended to: and for want of underſtanding it we are led into many haſty and miſtaken concluſions in ſeveral queſtions relating to civil government. The point, which I have been endeavouring to make out is in ſhort, that, beſides the compact, which unites a number of perſons into a body politic, and gives them an original legiſlative power, as a collective body, it is neceſſary, that there ſhould be ſome farther act of mutual conſent, in order to ſettle any other legiſlative body; that is, in order to eſtabliſh a form of government in any civil ſociety whatſoever. Unleſs indeed we could find a ſociety, where the government is popular in the fulleſt ſenſe of the word; a ſociety, where all perſons of free condition, who are old enough to be naturally capable of acting for themſelves, whether they are men or women, poor or rich, have a ſhare in the legiſlative power, and act by themſelves, and not by their repreſentatives.

But whilſt we maintain, that to form a civil ſociety, and to ſettle a civil conſtitution of government, two compacts or however two diſtinct acts of conſent are neceſſary; there is no occaſion to maintain, that theſe two acts ſhould be done at different times. When we ſpeak of that act, which produced the conſtitution of civil government, and formed a legiſlative body, as ſubſequent to the compact, which formed the civil

ſociety, and produced an original legiſlative power in the collective body; it is not neceſſary, that one of theſe acts ſhould be ſubſequent to the other in order of time: for there is no reaſon in the nature of the thing that ſhould hinder them from being done together. But ſtill in the order, in which we conceive them, the compact, that eſtabliſhes a legiſlative body, different from the collective body of the whole ſociety, muſt be conſidered as ſubſequent to the compact, which forms the collective body itſelf: becauſe we cannot conceive a legiſlative body different from the collective body to be ſettled; unleſs we firſt conceive, that ſuch collective body has itſelf been formed.

Neither is there any reaſon for maintaining, that the compact, which ſettles the form of government or eſtabliſhes the legiſlative body, muſt neceſſarily be an expreſs one. As men may unite themſelves to a civil ſociety by tacit agreement; ſo likewiſe, when they are ſo united, they may by tacit agreement ſettle a form of government. Any of our alienable rights may be loſt, and what we ſo loſe others may acquire, by uſage, cuſtom, or preſcription. The right of ſharing in perſon in the exerciſe of legiſlative power, which originally belongs equally to every member of civil ſociety, may not only be loſt by the particular and expreſs conſent of each, but by the joynt act of the majority, or by the long forbearance of all other members to uſe it, except thoſe, who, by ſuch long forbearance of the reſt, are eſtabliſhed into the legiſlative body.

We may now perhaps underſtand, what [1] Grotius means, when he tells us, that what he ſays in regard to kingly power in thoſe countries, where the legiſla-

[1] L. I. C. III. § VIII.

tive

tive or ſupreme power is lodged in the hands of one man, is equally applicable to the power of the nobility in ariſtocratical ſtates, and even to the power of the people in democratical governments. For as a king, inveſted with legiſlative power, is to be conſidered as a legiſlative body, appointed by the conſent of the collective body of the whole ſociety; ſo the nobles in ariſtocratical ſtates are a body of the ſame ſort appointed in the ſame manner: and even in democratical ſtates, ſince the legiſlative body is uſually a part of the people, and not the collective body of the whole ſociety, the legiſlative power of ſuch body muſt be derived from the ſame principles, and muſt reſt upon the ſame foundation with kingly power in monarchical conſtitutions.

How a civil conſtitution becomes fixed, as to the legiſlative.

V. Since the power of any legiſlative body within a ſociety, whether ſuch body conſiſts of one perſon, or of more, depends ultimately upon a compact or agreement of the collective body; it is plane, that every conſtitution of government, where either the whole legiſlative body, or ſome part of it, is not always in being, muſt naturally be precarious. For there can be no compact but between two parties at leaſt: and if one of the parties ceaſes to exiſt, the obligation of the other party is at an end. If therefore the power of the legiſlative body ariſes from conſent, agreement, or compact, between ſuch legiſlative body and the collective body of the whole ſociety; whenever the legiſlative body ceaſes entirely, the collective body is free to act as it pleaſes. This has already been taken notice of, when we were ſpeaking of civil ſocieties, which act by ſuch repreſentatives as are choſen only for a term of years.

In thoſe forms of civil government, where the peo-

ple have a ſhare in the legiſlative power, and act by repreſentatives choſen for ſuch a term; the conſtitution may however be ſo eſtabliſhed, as not to be precarious; provided that thoſe repreſentatives of the people do not compoſe the whole legiſlative body, and that the other part of this body is conceived to be always in being. If there is no ſuch part of the legiſlative body in being, the compact or agreement, upon which the conſtitution depends, will be no more than a compact between the people and themſelves; a compact, which they may revoke at pleaſure, becauſe there is no other party in it. But if, when the term expires, for which the repreſentatives of the people were choſen, there is ſtill a king, who is a part of the legiſlative body; ſuch a mixed conſtitution will be a ſettled one. He is the other party in the compact; and as on the one hand the conſtitution, or rather the compact by which the conſtitution was regulated, does not allow him a full legiſlative power in his own perſon, but ties him up from exerciſing ſuch power without the repreſentatives of the people; ſo on the other hand the ſame compact obliges the people to go on in the ſame manner, that they have done before, that is, to exercise their ſhare in the legiſlative power by repreſentatives, and not to change the form of government, in any reſpect by any act, which they may do in their collective capacity.

In an elective kingdom, if the king is the legiſlative body of the ſociety, during his life, the legiſlative power will, upon his death, return to its firſt original to the collective body of the people: and there will be nothing, which can properly be called a civil conſtitution, to hinder them, when it is ſo returned, from making

making what alteration they pleaſe in the future form of governmennt. Their choice of the former king was a compact between him and them, by which the legiſlative power was entruſted with him, to be exerciſed for the general utility, and for the ſecurity of the rights of the ſociety, and of its ſeveral members. But upon his demiſe, there is but one party in the compact remaining, and this party is the collective body of the people. They are therefore releaſed from their obligation to continue under ſuch a form of government, as they had once introduced, and may either renew that form, or introduce any other, as they, at that time, ſhall judge to be moſt convenient. It will be otherwiſe, if any part of the legiſlative body remains, during the interreign. If there is for inſtance then in being a ſtanding body of nobility, who are at all times a part and only a part of the legiſlative body; ſuch a body of nobles has no conſtitutional right to act independently of the collective body of the people in any inſtance, without a king at their head; they cannot therefore conſiſtently with the compact, which ſettled the conſtitution, make any change in that conſtitution. And as the ſame compact binds the collective body of the people to them, this collective body cannot, conſiſtently with ſuch compact, introduce any change in the conſtitution without their concurrence.

It will be nothing to the purpoſe to urge here in general, that the laws of every ſociety are ſufficient to continue the conſtitution, to lay the collective body of the people under an obligation of renewing their repreſentatives in democratical ſtates, or of appointing a new king in elective monarchies; even though during the interreign, there is no legiſlative body, or no part of a legiſlative body, in being, beſides the collective

body of the people. For certainly, if the ſociety continues during the interreign, there muſt, even in that interval of time be a legiſlative power in exiſtence: and as there is then no particular legiſlative body, ſuch legiſlative power muſt be veſted in the collective body. The conſequence is; that, during this interval, the collective body may make or alter laws, as they pleaſe, by their general conſent. And if they then agree to introduce a new conſtitution of government, ſuch an agreement effectually repeals all thoſe laws, by which the old conſtitution is ſuppoſed to have been eſtabliſhed.

The conſtitution of civil government in a nation may indeed be ſaid to be ſettled by law; and perhaps the word may be a more proper one than the word compact. But then if we trace ſuch conſtitution up to its firſt ſource, we ſhall find, that the law, which ſettles it, muſt be ultimately derived from the joynt conſent of the ſociety, that is, from the legiſlative power, not of any particular legiſlative body within that ſociety, but of the whole collective body. The particular form of government in any ſociety conſiſts in the particular ſort of legiſlative body, by which that ſociety is governed, or in the particular ſort of body, to which the legiſlative power of the collective body is given. To ſay therefore, that the form of government is ſettled or determined by any law, which is made by any particular legiſlative body of a ſociety, different from the collective body, is the ſame in effect as to ſay, that the legiſlative body makes a law, by which it gives itſelf legiſlative power, or that it makes a law, before it has any power to make one. If we apply this to monarchical governments, we ſhall readily ſee the abſurdity of it. One ſingle perſon in a civil ſociety makes a law, by

which

which he gives himſelf legiſlative power. But how can this law be binding upon the ſociety, if he had not legiſlative power, when he made it? He muſt have derived his legiſlative power from ſome law, which was not of his own making, or elſe he could have no right at all to make this any more than any other law. Can we ſay in ariſtocratical governments, that the ſelect few, who are but a part of the ſociety, have a legiſlative power over the whole in virtue of a law, which they themſelves eſtabliſhed? If we would ſay any thing in defence of their right to any legiſlative power, we muſt go up to a higher ſource of law, to a legiſlative power veſted originally in the collective body of the ſociety, which ſettled in this particular legiſlative body, all the power that they have of making laws, ſo as to bind the whole. In like manner we may aſk, in democratical ſtates, where the legiſlative body conſiſts of repreſentatives, or where it conſiſts of any thing leſs, than the whole collective body; by what law was this form of government ſettled? Certainly it could not be ſettled by any law, which was made by ſuch legiſlative body: becauſe the law, that we are enquiring after, muſt have been made, before they were a legiſlative body: it being a law, which eſtabliſhed them into ſuch a body, or which gave them a legiſlative power over the whole community.

Upon the whole; as the law, which determines the civil conſtitution, is derived from the original legiſlative power of the whole ſociety; ſo no conſtitution, though it has been once determined, can be any otherwiſe fixed and permanent, than by ſuch a proviſion, as will prevent the legiſlative power from returning again to the collective body: becauſe if it ever does ſo

return, the ſame legiſlative power, which determined the conſtitution at firſt, may either continue it or new-model it at pleaſure. And ſuch a proviſion is made in fact, where, by the original conſtitution, the legiſlative body, or ſome eſſential part of it, is continued always in being. We have already ſeen, that this may be done in mixed forms of government; and that for want of it even democratical governments and elective monarchies may be precarious conſtitutions.

But though ſuch conſtitutions of government, as have provided a ſtanding legiſlative body, either in whole or in part, are here called fixed or permanent ones; yet it is not neceſſary, that they ſhould continue for ever, or ſhould be unalterably the ſame, as long as the ſociety continues. They are called fixed or permanent conſtitutions; only becauſe they are not variable in their own nature. But yet we ſhall find in ſome of our future enquiries, that there are many ways, in which even ſuch civil conſtitutions, as theſe, are ſubject to alterations.

What I have now called a law is what I before called a compact ſubſequent, in the order of our conceptions, to the compact, which unites the ſeveral members of a civil ſociety into one body. For the firſt agreement or conſent of a number of individuals to unite together and form one body politic, though it produces a legiſlative power, does not veſt ſuch power in any particular part of the body, but in the whole. It does not give a legiſlative power to any ſingle perſon, as in monarchies; or to a few ſelect perſons, as in ariſtocracies; or to repreſentatives choſen by the people, or indeed to any part of the people excluſive of the reſt, as is commonly the caſe in what are called democracies. The original

original legiſlative power of the whole ſociety cannot be veſted in any particular legiſlative body, within that ſociety, any otherwiſe, than by means of a law, which is the effect of that original legiſlative power: and, as we ſhall ſee hereafter, ſuch a law is followed by an agreement or compact between the collective and the legiſlative body. When the ſociety has agreed to veſt its legiſlative power in a certain perſon or in a certain number of perſons; this perſon or theſe perſons, ſo appointed, become the legiſlative body of that ſociety, in conſequence of their acceptance of this power and of their agreement to exerciſe it in a body of ſuch a form, as is then ſettled.

Executive body how formed.

VI. Though we principally regard the nature or form of that body, in which the legiſlative power in any nation is veſted, when we denominate the conſtitution of government, in that nation, monarchical, or ariſtocratical, or democratical, or mixed; yet in order to form a full and diſtinct notion of ſuch conſtitution, we muſt conſider in what ſort of a body the executive power is veſted. This, which is the power of exerting the joynt ſtrength of the ſociety, is originally veſted in the whole collective body. If we look no farther, than the firſt compact, which united the ſeveral individual members into one ſociety; though an executive power would ariſe out of ſuch a compact, yet this power could not, by this compact alone, be lodged any where elſe, than in the collective body of the ſociety. The public will is the active principle, which puts the public force in motion: and if nothing has paſſed between the ſeveral individuals, which compoſe it, beſides the general agreement of uniting themſeves into a civil ſociety; the public will of ſuch ſociety is naturally the joynt will of the whole.

If

If the executive power is lodged any where elſe; if the will of any one perſon, or of any number of perſons, leſs than the majority, puts the public ſtrength in motion, and is underſtood to have a right of acting with this public ſtrength; ſuch right muſt be founded in ſome farther agreement, compact, or law, and could not naturally ariſe out of that compact or agreement, which merely produced the ſociety by uniting the ſeveral members of it into one body. Every individual in the liberty of nature has a right to exert his own ſtrength for his own defence and ſecurity: but each by becoming a member of civil ſociety acquires a farther right of acting with the common force of ſuch ſociety for theſe purpoſes: and in order to acquire this right, he conſents to uſe his own force no otherwiſe, than as a part of the common or public force. In this ſituation, as long as nothing elſe has paſſed, his will has as much influence in actuating the common force, or putting it in motion, as the will of any other individual, who is a member of the ſame ſociety with himſelf. This force does not indeed immediately operate upon his authority, or by the direction of his will; but then he has as much authority, his will has as much influence in exciting its operations, as the authority or the will of any one elſe has. As there is a natural equality amongſt mankind, before they unite in civil ſociety, ſo there is a ſocial equality amongſt them, after they are united: the mere act of thus uniting does not give any one particular perſon, or any number of particular perſons, authority over the reſt. This act binds each individual to ſubmit himſelf, in judging of his duty, to ſuch rules, as the common underſtanding preſcribes, and to conform his will, in uſing any force for his own defence

or

or ſecurity, to the common will of the ſociety. But the ſame act, which binds him to this, gives him a right to have his underſtanding conſidered as a part of the common underſtanding; that is, it gives him an equal right with any of his fellow-citizens to deliberate and determine concerning the rules of duty; and it gives him likewiſe a right to have his will conſidered as a part of the common will, that is, it gives him an equal right with any of his fellow-citizens to excite the public force or to put it in action. The conſequence of this is, that an executive body in a civil ſociety, if it is not the whole collective body of ſuch ſociety, can be no otherwiſe naturally formed, than the legiſlative body is. as ſome compact, agreement, or law, beſides that, which binds the ſociety together, is neceſſary to give any particular perſon or perſons the authority of preſcribing rules of duty to the reſt, or to eſtabliſh a legiſlative body; ſo a like compact, agreement, or law is neceſſary to give any particular perſon or perſons the authority of acting with the public force, excluſive of the reſt, or to eſtabliſh an executive body. By the mere conſent to unite and form a civil ſociety a legiſlative power and an executive power are produced: but if no other act has paſſed within the ſociety, which is ſo formed, the collective body is the natural ſeat of both theſe powers. Whenever therefore we find either a legiſlative body or an executive body diſtinct from the collective body; ſuch legiſlative or ſuch executive body muſt have been created by ſome farther act of conſent: they are formed by ſome farther compact between the collective body, in which theſe powers were originally veſted on the one hand; and the legiſlative or executive body, in which the conſtitution veſts them, on the other hand.

VII.

Deſpotic conſtitution how produced.

VII. Though we here conſider the legiſlative and executive bodies as diſtinguiſhed from one another, by being employed about different objects, or in different provinces; yet it is not neceſſary, that theſe bodies ſhould be different from one another in fact. Whatever prudential reaſons there may be; there does not appear to be any reaſon in the nature of the thing, againſt ſuppoſing, that both theſe powers may poſſibly be veſted in the ſame perſon or in the ſame body. Where the compact, by which theſe powers are conveyed, has eſtabliſhed both of them in the ſame perſon or in the ſame body, whether that body conſiſts of one perſon or of more, the conſtitution is called deſpotic. If they are both veſted in one man, it is an abſolute or deſpotic monarchy: if in a ſelect body of nobility, it is a deſpotic ariſtocracy; if in the repreſentatives of the people, or in any part of them, which is not a majority of the whole acting by joynt conſent, it may properly enough be called a deſpotic democracy; and laſtly, if they are both veſted in a body compounded of any two or all of theſe parts, the conſtitution, though a mixed one, will ſtill be a deſpotic one. In all theſe caſes the ſame body, which preſcribes what is to be done, having the public force in its hands to compel the execution of it, is ſubject to no conſtitutional checks or controls: it is poſſeſſed of the whole power of government, and conſequently is as abſolute, as it is poſſible for civil power to be. I ſay, as it is poſſible for civil power to be; becauſe civil power, when it is veſted any where, unleſs in the collective body of the ſociety, however abſolute it may be in ſome reſpects, is not ſo in all: we call it abſolute, where the conſtitution has provided no conſtant and uniform control of it; that is, we call it abſolute, when it is ſo in reſpect

reſpect of any conſtitutional reſtraint. But ſtill, as it is only civil power it will be limited by its own nature: for as this is a power formed for certain purpoſes, it cannot in its own nature be ſo far abſolute, as to be free either to promote thoſe purpoſes or to prevent them. What means of redreſs are to be uſed, when deſpotic governours, be they monarchical, ariſtocratical, democratical, or mixed, act contrary to the nature of that power, with which the conſtitution has entruſted them, will appear in ſome of our following enquiries.

Executive body how fixed.

VIII. The executive power continues, where the firſt agreement of the individuals to unite into a civil ſociety naturally placed it, in the collective body of the ſociety; if the magiſtrates, who put the public force in motion or act with that force, are appointed by the people, and continue, whilſt in office, ſo far accountable to their conſtituents, that the people in their collective body are the laſt reſort; that is, if in judicial matters an appeal lies to the people againſt the ſentence of any magiſtrate, and in matters of war or peace, conventions or alliance, nothing can be finally determined without the concurrence of the collective body. But though the magiſtrates are originally appointed by the people in their collective capacity, and though this appointment is only temporary, ſo that at the expiration of the term, for which their office was given them, the executive power will again revert to ſuch collective body; yet if, in the mean time, what thoſe magiſtrates do is final, and no appeal lies from them to the people, the executive power is veſted in their hands.

Such an executive body will indeed be of ſhort continuance in itſelf; and the conſtitution will in this reſpect be liable to frequent changes: becauſe upon every ex-

expiration of the term, for which the magiſtrates were appointed, the executive power reverts to the people, in whom it was originally veſted: and they are then as much at liberty, as they were from the beginning, either to exerciſe it for the future in their collective capacity, or to diſpoſe of it in the ſame manner, that they did before, or in any other manner, that ſhall then appear to them to be more convenient. If, inſtead of appointing a number of magiſtrates, they have appointed only one, and have left the appointment of the reſt to him; he cannot be conſidered as the executive body, if the public force of the ſociety, cannot upon all occaſions be exerted by his ſole authority without the expreſs concurrence of his conſtituents. When ſuch a magiſtrate is appointed, as acts independently of the collective body of the people, and is commiſſioned by them to exerciſe the publick force by his own authority, without their expreſs concurrence; he then becomes the executive body of that ſociety. But if he has this power only for a term of years, or if this power laſts even for his life, but no ſtanding proviſion is made to continue the like magiſtrate, either by making the office hereditary in his family, or otherwiſe; the conſtitution will be only temporary. At his death, or at the expiration of his term, the executive power reverts as before; and the people being bound by no law or no compact to go on in the ſame manner, may either renew the ſame or introduce a different ſort of executive body, as they ſhall judge moſt convenient. Where the executive body, after it is once appointed, continues always in being, as it does, either if it conſiſts of a number of perſons, ſome of which remain though others die, or go out of office, or if it conſiſts of only one perſon, and

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is made hereditary, ſo that upon his demiſe his heir ſucceeds immediately into his right; there is then a perpetual obligation ariſing from the compact, by which ſuch executive body was formed: becauſe there is then a party always in exiſtence, to whom the collective body of the people are bound by that compact. The conſtitution is by this means as fully eſtabliſhed, as the nature of the thing can admit of. It may indeed be changed, but it is not variable in itſelf: ſuch a conſent, as introduced it at firſt, may alter it afterwards; or as it is founded in compact, a breach of that compact on the part of the executive body will give the collective body, if not a conſtitutional, yet certainly a natural right to alter it.

National conſtitution a queſtion of fact.

IX. The point, in which each particular perſon ſeems to be moſt intereſted, is to be able to judge what is the particular form of government in the nation, to which he belongs. For, as he owes obedience to the ſovereign power, he cannot either know to whom his obedience is due, or ſettle the proper meaſures of it; till he has firſt informed himſelf to what perſon or perſons the ſociety has entruſted this power. But as the forms of government, which may poſſibly be eſtabliſhed, are very various, there does not ſeem to be any way of determining what form has been eſtabliſhed in any particular nation, but by acquainting ourſelves with the hiſtory and the cuſtoms of that nation. A knowledge of its preſent cuſtoms will inform us what conſtitution of government obtains now; and a knowledge of its hiſtory will inform us by what means this conſtitution was introduced or eſtabliſhed. This ſeems to be ſelf-evident, upon the principles already laid down.

The ſovereign power, both in its legiſlative and in its executive

executive part, is originally ſeated in what [k] Grotius calls the general ſubject of ſuch power, that is, in the ſociety itſelf conſidered as one collective body. If therefore there is, within the ſociety, what he farther calls a particular ſubject of ſuch power, that is, if there is any legiſlative or executive body, which does not take in the whole collective body; this legiſlative and this executive body muſt have been eſtabliſhed either by expreſs or by tacit compact: and the terms or conditions of ſuch compact cannot be found any where elſe but in the hiſtory, records, or ſtanding cuſtoms of the nation.

Some indeed, who are better pleaſed with amuſing themſelves in ſpeculations, than with enquiring into facts, have endeavoured to ſettle our notions of civil conſtitutions by abſtract reaſonings: as if ſuch reaſonings alone would be ſufficient to teach us univerſally, what form of government is eſtabliſhed in all countries, without attending to the hiſtory or cuſtoms of any. As this method favours the idleneſs of ſuperficial politicians, it is no wonder, that theſe abſtracted philoſophers ſhould have many followers. Moſt men are willing to be thought very knowing in all queſtions, which relate to the conſtitution of civil government in their own country; and few are willing to take ſo much pains, as is neceſſary to give them a tolerable inſight into ſuch queſtions. It would be a great expence of time and labour to read hiſtory, to collect and conſider uſages or cuſtoms, to ſearch records, to examine and compare facts. But ſuch abſtract arguments are eaſily invented, as will ſerve to puzzle both the inventer and his diſciples, though they ſhould neither be convincing to himſelf,

[k] L. I. C. III. § VIII.

ſelf, nor to any one elſe. This ſeems to be the reaſon, why moſt of thoſe, who write or talk about the conſtitution of civil government in our own or in any other country, ſhould deal more in metaphyſical reaſonings, than in arguments drawn from facts and obſervation, and ſhould chuſe to learn their political principles, rather from the ſubtilties of ſchoolmen, than from records and hiſtory.

Sometimes we are told on the one hand, that monarchy is the beſt form of government, that it muſt be a natural form, becauſe the providential government of the world is of this ſort, and that, as it ariſes neceſſarily out of parental authority, no other form can poſſibly be eſtabliſhed of right, whatever may have been done in fact. On the other hand we are told, that ſupreme civil power is naturally and unalienably in the collective body of the people; and that conſequently all eſtabliſhments, which ſuppoſe a ſupreme power any where elſe, muſt be mere uſurpations.

Monarchical conſtitutions not more natural than others.

X. What is generally urged to prove, that monarchical conſtitutions are the only natural forms of government, is ſcarce worth examining. [1] We have already ſeen at large, how little reaſon there is for imagining that monarchical power ariſes naturally out of parental authority; or at leaſt for imagining, that it ſhould ſo ariſe without the aid of compact. And if children, after they are come to years of diſcretion, are not ſubject to any civil power of their father, till they have conſented to it; they might naturally have withholden their conſent, ſo as to continue in that freedom and independency, to which they were born; or might, by giving a like conſent elſewhere, have eſtabliſhed any

[1] See B. II. C. II. § IV.

other civil government, either of the ſame form with what would have ariſen in their own family, if they had agreed to remain under the civil power of their father, or of any other form, which they like better.

Notwithſtanding the providential government of the world may be called monarchical; this is no reaſon why mankind ſhould be bound to eſtabliſh the ſame form in civil ſocieties. Nor is it even an inducement to copy this form; till human monarchs can be ſhewn to have the ſame knowledge, to contrive for the benefit of their ſubjects, and the ſame goodneſs, to diſpoſe them invariably to purſue this benefit, that God has to contrive for and to purſue the benefit of all his creatures.

As to the ſuperiour advantages of monarchical government above any other form, it muſt at leaſt be allowed, that they are very far from being ſelf-evident: and conſequently, even ſuppoſing them to be greater than they really are, it is very poſſible for a nation, in eſtabliſhing its civil conſtitution, not to be aware of them. And ſince the collective body of the people is originally at liberty to introduce what form they pleaſe, it is poſſible for them to make choice of another. However, all theſe ſuppoſed advantages would be found, upon enquiry, to be at leaſt balanced, or rather to be outweighed by many inconveniences, which would probably determine any nation, to chuſe another ſort of conſtitution: if they were not miſled for want of proper deliberation, or were not driven by diſtreſs to fix upon what in better circumſtances they would not have choſen.

Politicians are however very well employed in comparing and balancing the advantages and inconveniences of each form of government with one another. For though

though the reſult of their enquiries will never determine what form it is, which any particular nation has agreed to eſtabliſh, yet it may ſerve to ſhew every nation what is the moſt deſireable form, and may lead them, as they have opportunity, to make ſuch alterations in their own, as will bring them nearer to that point, if they cannot quite reach it. Certainly our [m] engliſh poet has but little reaſon on his ſide, when he repreſents ſuch an enquiry, as the buſineſs of fools, and maintains, that the only difference between civil conſtitutions of government conſiſts in the better or worſe adminiſtration of them: for that conſtitution is in his judgment to be called the beſt, let it be what it will, which is beſt adminiſtered. Whatever public benefit depends upon the character of the perſons in power, it is derived from their wiſdom and goodneſs, and not from the nature of the form of government. So that to call that form the beſt, which is beſt adminiſtered, ſeems to be ſpeaking improperly. Or if we will call it the beſt, we muſt in the mean time allow, that it is the beſt by accident only, and not in its own nature. In the common courſe of human affairs it is almoſt impoſſible to prevent the civil power from coming into the hands of weak and bad men, whatever the conſtitution is. That form of government therefore is beſt in itſelf, which guards moſt effectually againſt this evil, or if this evil ever does happen, which lays the perſons in power under ſuch checks and reſtraints, as are moſt likely to prevent them from abuſing their truſt, or laſtly if this truſt is abuſed, which has provided the readieſt means for correcting the abuſes. An abſolute monarchy is a conſtitution, which has ſo little title to theſe characters,

[m] Pope. Eſſay on man. Ep. II. lin. 305. 306.

that it can have no pretenſion to be thought the only natural, and much leſs the only poſſible, form of government, upon account of its being the beſt form.

Monarchical conſtitutions not impoſſible.

XI. But yet it does not appear on the other hand, as Mr. Lock[n] maintains, "that a monarchical government is inconſiſtent with civil ſociety, and ſo can be no form of civil government at all. The end of civil ſociety being, he ſays, to avoid and remedy thoſe inconveniences of the ſtate of nature, which neceſſarily follow from every mans being judge in his own caſe, by ſetting up a known authority, to which every one of that ſociety may appeal, upon any injury received, or controverſy that may ariſe, and which every one of that ſociety ought to obey; wherever any perſons are, who have not ſuch an authority to appeal to, for the deciſion of any difference between them, there thoſe perſons are ſtill in a ſtate of nature. And ſo is every abſolute prince in reſpect of thoſe, who are under his dominion. For he being ſuppoſed to have all, both legiſlative and executive power in himſelf alone, there is no judge to be found, no appeal lies open to any one, who may fairly and indifferently, and with authority decide, and from whoſe deciſion relief and redreſs may be expected, of any injury or inconvenience, that may be ſuffered from the prince or by his order: ſo that ſuch a man, however entitled, czar, or grand ſignior, or how you pleaſe, is as much in the ſtate of nature with all under his dominion, as he is with the reſt of mankind. For wherever any two men are, who have no ſtanding rule, and common judge to appeal to on earth, for the determination of controverſies of right betwixt them, they are ſtill in a ſtate of nature".

[n] Lock's works. V. II. p. 198.

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Though we ſhould not be able to ſhew, why this reaſoning is inconcluſive, yet we may be ſure, that it is ſo, if it proves too much; that is, if it proves ſome propoſition to be falſe, which we are ſure is true. Now the ſame argument, which he here urges to prove, that abſolute monarchy is inconſiſtent with the nature of civil government, and conſequently that it cannot poſſibly be a form of civil government, will equally prove, that any other form of government is likewiſe inconſiſtent with civil ſociety, and conſequently that there can be no ſuch thing as any form of civil government.

Let us try this argument in another inſtance. Wherever any perſons are, who have no authority to appeal to for the redreſs of any injury, which is received, or for the deciſion of any controverſy, which may ariſe between them; there thoſe perſons are ſtill in a ſtate of nature. And ſo is every legiſlative body in reſpect of thoſe, who are under its dominion. For this body being ſuppoſed to have all the legiſlative power in itſelf alone, there is no judge to be found, no appeal lies open to any one, who may fairly and indifferently, and with authority decide, and from whoſe deciſion relief and redreſs may be expected, of any injury or inconvenience, that may be ſuffered from ſuch legiſlative body or by its order: ſo that ſuch a body, if it does not conſiſt of the whole ſociety, however it may be entitled, ſenate, or aſſembly of eſtates, or how you pleaſe, is as much in the ſtate of nature with all under its authority or dominion, as it is with the reſt of mankind.

It will ſcarce be replyed here, that we have not ſuppoſed the executive power to be veſted with the legislative power in this body, as they are both veſted in an abſolute monarch: becauſe Mr. Lock would ſcarce

allow the executive body, if it is diſtinct from the legiſlative, to be an authorized judge for deciding any controverſy between the legiſlative body and the reſt of the ſociety, from whoſe deciſion relief and redreſs may be expected of any injury or inconvenience, that may be ſuffered by any perſon in the ſociety from ſuch legiſlative body. And if the executive body is not ſuch an authorized judge; there will not, in point of wanting an authorized judge, appear to be any difference between the ſituation of an abſolute prince in reſpect of his ſubjects, and the ſituation of a legiſlative body in reſpect of the reſt of the ſociety. To ſuppoſe the executive body to be ſuch an authorized judge, is to ſuppoſe its power to be ſuperiour to that of the legiſlative body; ſince giving the former ſuch an authority as this, would be giving it authority to ſet aſide the acts of the latter. Nay the executive body is ſo far from being a judge with authority to relieve and redreſs any inconvenience, that may be ſuffered by any perſon within the ſociety from the acts of the legiſlative body; that if it is veſted with no power, but what its name imports, that is, with none but executive power, it is not ſo much as a check upon the legiſlative body. For as the legiſlative power is the ſupreme power, ſo the executive body, if it is poſſeſſed of no other power, than what is merely executive, is naturally miniſterial to the legiſlative. And it will be very difficult to find any difference between a prince, who has all, both legiſlative and execeutive, power in himſelf alone, and a legiſlative body, which has in itſelf alone all legiſlative power, and to which the executive body with all executive power is wholly miniſterial. To make the executive body a check upon the legiſlative, we muſt ſup-

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poſe it to be poſſeſſed of ſome prerogative and to be ſuch a neceſſary part of the legiſlative, that nothing can be done by the legiſlative body without the conſent of the executive. Yet even in ſuch a conſtitution as this, it will ſcarce be maintained that the executive body is an authorized judge to give relief and redreſs of any injury or inconvenience, that any perſon may ſuffer from the legiſlative or by its order.

It may indeed be ſaid, that ſuch a legiſlative, eſpecially if repreſentatives choſen from time to time by the people are a conſtituent part of it, can do no injury; becauſe what is done by their authority is properly the act of the people, whom they repreſent. But neither will this make any difference between the two caſes. For in whatever ſenſe ſuch a legiſlative body is ſaid to be incapable of doing any injury, an abſolute monarch may be ſaid likewiſe to be incapable of doing any. As the repreſentatives of the people are commiſſioned to act for the people; ſo an abſolute monarch, as his authority is originally derived from the ſame ſource, is likewiſe commiſſioned to act for them. And conſequently, if it is ſuppoſed impoſſible for the people to be injured by what their repreſentatives do, it will for the ſame reaſon be impoſſible for them to be injured by what an abſolute monarch does: becauſe both the repreſentatives and the monarch are commiſſioned by the original conſent of the people to act for them; ſo that the peoples conſent is as much implyed in what one of them does, as in what the others do. As a civil ſociety has the common good of the public in view, ſo the natural end of that legiſlative power, which ariſes from civil union, is the common good. The power therefore, which is committed to a legiſlative body, being the

legiſlative power of the ſociety, is in its own nature limitted to this purpoſe: as the ſociety had no other legiſlative power to give, ſo the legiſlative body can have no other veſted in it. Whilſt therefore it continues to uſe the power, which was given it by the conſent of the ſociety, it can do no injury. But the queſtion is, whether, if it acts for any other purpoſe, it is impoſſible for it to injure the ſociety? and if it does ſo injure the ſociety, the next queſtion will be, who is the common judge between ſuch legiſlative body, and the body of the ſociety?

Mr. Lock has ſhewn us, that theſe queſtions may be applyed with as much propriety to a mixed legiſlative body, as to an abſolute monarch. [o] "Governments, he ſays, are diſſolved, when the legiſlative body acts contrary to its truſt. He puts the caſe of a legiſlative body conſiſting of three diſtinct parts. Firſt a ſingle hereditary perſon having the conſtant ſupreme executive power, and with it the power of convoking and diſſolving the other two, within certain periods of time. Secondly, an aſſembly of hereditary nobility. And thirdly, an aſſembly of repreſentatives choſen from time to time by the people. As any other ſort of legiſlative body, ſo ſuch an one as this, acts, he ſays, againſt the truſt repoſed in them, when they endeavour to invade the property of the ſubjects, and to make themſelves, or any part of the community, maſters or arbitrary diſpoſers of the lives, liberties, or fortunes of the people. For ſince it can never be ſuppoſed to be the will of the ſociety, that the legiſlative body ſhould have a power to deſtroy that, which every one deſigns to ſecure by entering into ſociety, and for which the people ſubmitted themſelves

[o] Lock ibid. p. 237.

ſelves to legiſlators of their own making; whenever the legiſlators endeavour to take away and deſtroy the property of the people, or to reduce them to ſlavery under arbitrary power, they put themſelves into a ſtate of war with the people, who are thereupon abſolved from any farther obedience, and are left to the common refuge, which God has provided for all men againſt force and violence". Who then are the common judges between the legiſlative body and the collective body of the ſociety, when the former thus injures the latter? Shall we ſay, that, as long as the legiſlative body diſcharges its truſt, there is no occaſion for ſuch a common judge, and that, when it abuſes its truſt, the government is diſſolved? May not we therefore ſay the ſame, where a ſingle hereditary perſon is the legiſlative body? As long as he diſcharges his truſt, there is no occaſion for any common judge between him and the body of the ſociety, and when he abuſes his truſt, the government is diſſolved? The people do not feel the want of a common judge, either where the legiſlative body is ſimple, or where it is mixed; till the truſt committed to ſuch body is abuſed. But if we conſider, as Mr. Lock does here, what the ſituation of the people is, in reſpect of their legiſlators of either ſort, when there is a notorious abuſe of this truſt, we ſhall find, that there is in fact no more a common judge in one conſtitution of government, than there is in the other. The conſequence of which will be; that, if abſolute monarchy is an impoſſible form of government, becauſe it is inconſiſtent with the nature of civil ſociety; a mixed legiſlative, or any other legiſlative will be an impoſſible form of government, for the ſame reaſon.

The inſtitution of a legiſlative, Mr. Lock ſays, is

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an umpirage provided by the members of the ſame ſociety for the ending all differences, that may ariſe amongſt them, and is a bar to the ſtate of war. He does not tell us, whether he means here the inſtitution of a legiſlative power or the inſtitution of a legiſlative body. If by legiſlative he means a legiſlative body it is not neceſſarily true, that where no legiſlative has been inſtituted, different from the collective body of the ſociety, there is no ſtanding umpirage, which may decide all controverſies, and be a bar to the ſtate of war amongſt the members of the ſame ſociety. Civil union naturally creates a legiſlative power; which is originally veſted in the whole body of the community. But whilſt it reſides there, it is as natural a bar to the ſtate of war, as if it was veſted in a particular part of the ſociety, or in a legiſlative body, either ſimple or mixed. Such a body, upon the inſtitution of it, may be conſidered as having the ſtanding umpirage, which bars the ſtate of war. But between whom has it this umpirage? Between the ſeveral members of the collective body; and not between itſelf and this collective body. If then in a mixed conſtitution, we may ſay, that by the ſtanding umpirage of the legiſlative body there is a bar to the ſtate of war; we may ſay the ſame in a monarchy. Or if in a monarchy, the legiſlative body and the people muſt be conſidered as in a ſtate of nature with one another, for want of a ſtanding umpirage between ſuch legiſlative and the people; we muſt for the ſame reaſon conſider a mixed legiſlative and the people as in a ſtate of nature; ſince there does not appear to be any ſtanding umpirage between them. This reaſoning is equally applicable to all forms of government, except ſuch a perfect democracy, as we ſcarce any where find to have been eſtabliſhed.

It may perhaps be urged, that a mixed legiſlative body is not likely to abuſe its truſt; eſpecially where an eſſential part of it conſiſts of perſons, who are choſen from time to time by the people, and who are at all times ſo far conſidered as a part of the people, as to be ſubject to all laws made by their own concurrence, and to the ſame laws, that the reſt of the people are ſubject to. This is undoubtedly true: and the neceſſary conſequence is, that ſuch a mixed conſtitution is vaſtly preferable to a monarchy. But this conſequence does not affect the point in queſtion. We are not endeavouring to prove, that a monarchy is as good a conſtitution of government, as any other, but only that it is as poſſible as any other; not that it is as unlikely to be abuſed, but that it is as conſiſtent with the nature of ſociety, as any other. And the great uſe to be made of this point, when it is eſtabliſhed, is to ſhew, that the abſtract argument, by which Mr. Lock endeavours to prove, that no government can be monarchical, will be of little ſervice to thoſe lazy politicians, who think they have ſufficient grounds to conclude the civil conſtitution of their own country to be popular, from general reaſonings upon the nature of civil government, without having recourſe to records and hiſtory, to cuſtom and uſage; without looking back to the manner, in which their civil conſtitution was begun at firſt, and to the changes, which it has ſince undergone.

But after it has been thus ſhewn, that Mr. Locks reaſoning is inconcluſive, it may ſtill be asked, why is it inconcluſive? We ſay, that the want of a common judge between the body of the ſociety and its monarch can be no reaſon for concluding, that theſe

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two parties are neceſſarily in a ſtate of nature; becauſe there is the ſame want of a common judge between the government and the body of the ſociety in all conſtitutions whatſoever, except ſuch, if there be any ſuch, as are perfectly democratical: ſo that if we were to admit the truth of this principle, we ſhould be led to conclude from it, that in all other conſtitutions whatſoever, the conſtitutional governours and the reſt of the ſociety are in a ſtate of nature. Either therefore it muſt be allowed, that this principle is a falſe one, or elſe it muſt be maintained, that all conſtitutions of government are alike inconſiſtent with the nature of ſociety. But though we are ſure, that no principle can be true, if it neceſſarily leads to a conſequence, which is confeſſedly falſe; yet ſtill it may not be thought enough to prove in this manner, that it is not true, unleſs we can ſhew why it is not; that is, unleſs we can ſhew, how two parties can poſſibly be conſidered as not in a ſtate of nature, though they have no common judge to decide in diſputes between them.

Now it is certain, that perſons in a ſtate of nature have no ſtanding judge of controverſies, who can decide between them with authority: but till it is ſhewn, that the having ſuch a judge is the only effect of ſociety, the converſe will not be as certain; it will not be certain, that where there are two or more perſons without any judge, who can ſo decide, thoſe perſons muſt be in a ſtate of nature. Indeed in civil ſocieties all individuals, in matters of private right or obligation, have a ſtanding judge, veſted with authority to decide finally: and this judge is the legiſlative body, or [p] rather the executive body acting under the

[p] See B. II. C. III. § VII.

checks

checks and controls of the legiſlative. But then the exiſtence of ſuch a judge in ſome inſtances neceſſarily implys, that there can be no ſuch judge in other inſtances. For no deciſion can be final, unleſs the contending parties chuſe to acquieſce it it, where there is a farther judge to appeal to. If therefore there is a ſtanding judge, whoſe ſentence is final; the exiſtence of ſuch an authority neceſſarily implys, that there can be no farther appeal, or that there is no ſtanding judge, between this final one and the parties in controverſy. A ſtate of ſociety however, though in controverſies between the legiſlative body and the community there is no ſtanding judge, may eaſily be diſtinguiſhed from a ſtate of nature. The very exiſtence of ſuch an authority, as is lodged with the legiſlative body, is ſufficient to make the diſtinction: becauſe in a ſtate of nature there is no ſuch authority. Thus much indeed muſt be allowed, that, when there is occaſion for a common judge between theſe two parties, between the legiſlative body and the reſt of the ſociety; that is, where the former have uſurped a power, which does not belong to them; theſe two parties are then ſo far reduced to a ſtate of nature, that they will have no means of deciding the controverſy between them, but that force or ſtrength, which nature has given them. But when this happens the conſtitution of government does not ſubſiſt, but is diſſolved.

Upon the whole; the reaſon, why a monarch and the collective body of the ſociety, are not in a ſtate of nature, is becauſe this body has entruſted him with ſuch an authority over it, as the ſtate of nature knows nothing of. His authority indeed is not an arbitrary one of doing what he pleaſes with the people, that he governs:

governs: though there are no conſtitutional checks and controls provided for his reſtraint, the authority entruſted with him is a limited one in its own nature, as being intended for the ſecurity and advancement of the common benefit. He and the ſociety will indeed be in a ſtate of nature, when he abuſes this truſt. But this inſtead of proving, that a monarchical conſtitution neceſſarily places the monarch and his people in a ſtate of nature, will only prove, that they come into ſuch a ſtate, when the conſtitution is diſſolved.

All conſtitutions not neceſſarily democratical.

XII. What I have here principally in view is to convince the reader, that the only reaſonable method of learning what is the conſtitution of government in any nation, is to read the hiſtory of that nation, and to collect from its moſt authentic records ſuch facts, as relate to the forming the conſtitution, as far back as we can go, and ſuch likewiſe, as relate to any ſudden, or to any gradual changes, which have from time to time been made in it. I have with this view examined already ſome of the abſtracted arguments, by which it has been attempted to prove on the one hand, that all conſtitutions, except ſuch as are monarchical, are unnatural, and on the other hand, that a monarchical conſtitution is inconſiſtent with the nature of civil ſociety.

We may now go on to conſider and explane what Grotius ſays upon this ſubject; and perhaps, when his opinion is thoroughly examined and placed in a true light, it may be found leſs exceptionable, than at firſt ſight it appears to be. [q] Grotius maintains it to be a falſe and dangerous opinion, that in all civil ſocieties, without exception, the ſovereign power is veſted in

[q] L. I. C. III. § VIII.

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the people, ſo as to make them the conſtitutional judges, whether their kings or other governours abuſe their authority, and to give them a conſtitutional right of reſtraining or puniſhing thoſe governours, where they are chargeable with ſuch abuſe. His commentator here accuſes him of ſtating the queſtion in a falſe and inſidious manner. No one, ſays Gronovius, ever thought, that the ſupreme power is, every where and without exception, lodged in the hands of the people, ſo as to give them a right to reſtrain and puniſh their kings, whenever they miſuſe their power; or if any one ever has thought ſo, we can by no means agree with him. Thus far therefore the commentator and the author ſeem to be of the ſame opinion. But Gronovius goes on to inform us, that this is not the point in queſtion. The true ſtate of the queſtion is, whether a people having a government lawfully eſtabliſhed, whether a people, that have once agreed to be governed by a king, or by a ſenate of nobles, or by an aſſembly of the eſtates, may not change the government, and even puniſh their governours, when the greater part of the ſociety perceive ſuch eſtabliſhed government to be deſtructive of the common good; when their king is plainly become a ſingle tyrant; or their ſenate of nobles is degenerated into a body of tyrants; or their aſſembly of eſtates is changed into a confuſed meeting of ſeditious factions. This indeed, which Gronovius propoſes, is one queſtion: but he had no reaſon for charging Grotius with ſtating it inſidiouſly; if it is not the queſtion, which Grotius here deſigned to examine. It is one queſtion, whether the collective body of the people have, every where and without exception, a conſtitutional right to reſtrain and puniſh their kings, or

their

their nobles, or their ſtanding repreſentatives, that is, whether all conſtitutions of government muſt neceſſarily be perfect democracies. And it is another queſtion, whether the people, whatever form of government they may have conſented to eſtabliſh, have not a natural right to judge, when that conſtitution is broken; and when it is, to introduce, if they are able, a new form of government, to put the civil power under other regulations, and to reſtrain or puniſh thoſe, who have abuſed it, if they ſhall attempt to eſtabliſh their unconſtitutional uſurpations by force. If the latter queſtion had been what Grotius here deſigned to examine, he might indeed juſtly be charged with ſtating it inſidiouſly. But if he deſigned to examine the former, he ſeems to ſtand clear of this charge. And certainly his words planely ſhew us, that he had the former of theſe two queſtions in his mind. Or if his words are not a ſufficient evidence, we may have fuller evidence by attending to [r] the arguments, which he tells us are made uſe of in defence of the opinion, which he rejects: for thoſe arguments, if they prove any thing, would prove, that the collective body of the people have every where without exception a conſtitutional right of reſtraining and puniſhing the legiſlative body, and not that they have a natural right of doing themſelves juſtice, where the civil conſtitution is diſſolved by unconſtitutional uſurpations of power. There is ſtill a farther evidence, that he had no thoughts of examining into the latter of theſe two queſtion in this place: for it is ſcarce likely, that he ſhould undertake to examine it twice; and we find, that he does examine it in [s] another place.

[r] Grot. ibid. [s] Grot. L. I. C. IV. § VII.

What

What our author has ſaid upon the point before him will be the more readily admitted; if we attend to his principles in their full extent. Though he explanes himſelf in the inſtance of monarchical government, his principles, [a] he ſays, are intended to be general, ſo as to be applicable to the ſovereign body, whatever the form of that body is; whether it conſiſts of a ſingle perſon, as in monarchies; or of a ſenate of nobles, as in ariſtocracies; or of any ſelect part of the people, as in moſt democracies; or is compounded of all theſe, as in mixed conſtitutions. And if we ſuppoſe the ſovereign body to conſiſt of a ſingle hereditary perſon having the conſtant ſupreme executive power, of an aſſembly of hereditary nobility, and of an aſſembly of repreſentatives choſen from time to time by the people; it will ſcarce be thought an error in political principles to maintain, that the collective body of the people have not a conſtitutional right to reſtrain and puniſh ſuch a body as this.

All that our author maintains more than this is, that monarchical government is poſſible, that it is poſſible for the collective body of the people to veſt the ſupreme power both legiſlative and executive in the hands of one man. And even what he alledges in ſupport of his opinion has been the more blamed for want of conſidering, that his arguments upon this head are as applicable to all other forms of government, as they are to monarchical ones: ſince it will ſcarce be poſſible to ſhew, that the collective body of the people can veſt ſuch a power in any number of perſons of what ſort ſoever, leſs than the majority, if they cannot veſt it in a ſingle perſon.

[a] Grot. L. I. C. III. § VIII.

Our [1] authors topic, from which he ſets out, when he is to prove, that the whole civil power, legiſlative and executive, may be entruſted with a ſingle perſon, has been the ground of ſome exceptions to his whole opinion. The law of nature, he ſays, allows an individual to diſpoſe of his own perſon, ſo as to make himſelf a ſlave; and he appeals to the moſaic and to the roman law in ſupport of this principle. From whence he argues, that a number of individuals, though formed into a civil ſociety, may, conſiſtently with the law of nature, ſubject themſelves in ſuch a manner to the civil power of any one man, as to retain to themſelves no part of that power either legiſlative or executive. The reader has already ſeen in one inſtance what abilities Gronovius was poſſeſſed of as a commentator; and his manner of treating this argument will give us another ſpecimen of them. He firſt miſtakes our authors meaning, and gives him a very exceptionable one, and then grants the whole argument to be concluſive in the miſtaken and exceptionable ſenſe, in which he underſtood it. Many, who read Grotius, fall into the ſame miſtake with him, as to the authors meaning: but then they are wiſe enough to ſee, that, if Grotius meant what they imagine him to mean, his argument would not be concluſive. He is generally ſuppoſed to reaſon in the following manner — Since the law of nature allows an individual, by his own act, to make a ſlave of himſelf, or to ſubject himſelf to the private deſpotiſm of his maſter; the ſame law muſt neceſſarily allow a number of individuals, by their own act, to make ſlaves of themſelves, or to ſubject themſelves to the private deſpotiſm of their civil governour. Thus he is ſuppoſed to conclude from what may be done in one caſe that the ſame may be done in the other. Where

[1] Grot. ibid.

in fact his argument is ſuch an one, as the logicians call *a majori ad minus*; he reaſons from the poſſibility of doing more to the poſſibility of doing leſs. Since the law of nature allows an individual, by his own act, to part with ſo much of his liberty, or ſo much of his power over himſelf, as to become a ſlave; it cannot but allow a number of individuals to do what is leſs than this, to part with ſo much of their power over themſelves in their ſocial capacity, as to retain no conſtitutional civil power. If the law of nature allows a man, by his own act, to ſubject himſelf to private deſpotiſm by making himſelf a ſlave; it cannot but allow him, by his own act, to do leſs than this, to part with his liberty in a leſs degree, and ſubject himſelf to civil deſpotiſm, by giving up all the ſhare, which he had, as a member of civil ſociety, in the legiſlative and executive power.

It may be neceſſary here juſt to mention the difference between ſlavery and civil ſubjection on the one hand, and between private and civil deſpotiſm on the other. The ſlave is bound to make the good of his maſter the end of all his actions, and conſequently to conform himſelf in all things to the will of his maſter. The ſubject is bound to preſerve and advance the good of the civil community, and conſequently to conform himſelf to the will of ſuch community, in all things, which relate to the general good. Private deſpotiſm therefore implys a right in the maſter to direct all the actions of the ſlave for his own benefit. Civil deſpotiſm implys a right in the civil governor to direct ſuch actions of the ſubjects, as relate to the general good or benefit of the ſociety. From hence we may underſtand, that our authors reaſoning is concluſive, when it is conſidered, as he intended it, only as an argument *a majori ad*

minus; from what is greater to what is leſs. If the act of an individual can bind him to ſubmit all his actions to be directed by the will of his maſter, for the intereſt of his maſter; a like act can bind any one individual or any number of individuals to ſubmit ſuch of their actions, as are relative to the ſociety, of which they are members, to be directed by the will of their civil governour, for the common intereſt of the public. Certainly, if mankind are incapable of laying themſelves under ſuch an obligation as this, there can be no ſuch thing as an eſtabliſhed form of government, unleſs it is a perfect democracy: for this is the ſubjection, which the individuals, who are members of civil ſociety owe to the legiſlative body; whether that body conſiſts of one man, as in monarchies, or of a ſelect body of hereditary nobility, as in ariſtocracies, or of any part of the people leſs than the majority of the whole ſociety, as in all democracies, but thoſe which are perfect ones; whether ſuch part is conſidered as the repreſentatives of the reſt, or whether it is a part, which acts collectively inſtead of the whole. We may obſerve by the way, though it does not relate to our authors reaſoning, that even private deſpotiſm is not ſuch a ſort of power, as it is commonly ſuppoſed to be. [u] It is not a right in the maſter to do what he pleaſes with the ſlave. It is naturally ſubject to ſeveral limitations; and as the ſlave is injured, when any of theſe limitations are broken, he has a right to ſeek for redreſs. A ſingle ſlave indeed may be too weak to have the means of redreſs in his power: but a nation of ſlaves, if Grotius had ſuppoſed any ſuch thing, would have ſtrength enough to ſupport their rights, if they were willing to uſe it. However Grotius

[u] See B. I. C. XX. § V.

does not ſuppoſe any ſuch thing; but whilſt he contends for the poſſibility of a peoples committing the whole civil power, both legiſlative and executive, to a part of the ſociety, as for inſtance to a king in ſome conſtitutions, to the nobles, or to the aſſembly of the eſtates in others, he conſiders the power in the hands of this part, only as civil power, and not as private deſpotiſm; and he conſiders the people as in a ſtate of civil ſubjection, and not as in a ſtate of ſlavery. If he had not this diſtinction in his mind, his whole reaſoning here would be inconſiſtent with the firſt principles, which he lays down [*] elſewhere, when he defines a nation to be an aſſembly of men of free condition, in oppoſition to a family of ſlaves. And whether this civil ſubjection is due to one man or to more, it is ſtill but civil ſubjection: the power acquired by it is only civil power, that is, a power of directing and of compelling the ſubjects to promote the common good and benefit in all ſuch actions, as relate to the peace and welfare of the ſociety. This power is not tyrannical in itſelf and does not imply, that they, who are entruſted with it, have any right to compel the ſubjects to purſue any other end. If they ſhould under the colour of this power pretend, that they have ſuch a right, I do not find that our author maintains it to be unlawful for the people to make uſe of ſuch means, as they can, to prevent themſelves from being enſlaved.

After Gronovius has ſuppoſed his author to be contending, that a number of individuals, uniting into a civil ſociety, may, conſiſtently with the law of nature, make themſelves ſlaves to their governour, and has granted the whole force of the argument in this mis-

[*] L. I. C. I. § IX.

taken ſenſe of it, which no one elſe, but himſelf would have granted; he aſks, what is the farther conſequence? and then amuſes himſelf with contending, that, though ſuch nations, as have thus enſlaved themſelves, may be ſlaves, if they pleaſe; yet the conſequences of this argument are not applicable to any nation in europe. As if Grotius had here been endeavouring not only to prove that any ſubjects, conſidered as members of civil ſociety, may be as much at the arbitrary diſpoſal of their civil governours, as ſlaves are at the arbitrary diſpoſal of their maſters; but that ſome or all the nations in europe have in fact thus enſlaved themſelves. As our author had no intention to prove in general, that ſubjects, as members of civil ſociety, may be ſlaves, ſo he had much leſs any intention of proving this to be the caſe in fact of any nation whatſoever. The point, which he has in view, is only to ſhew, that all conſtitutions of government are not, in the nature of the thing, purely democratical; that the collective body of the people, though the ſupreme legiſlative and executive powers begin from them, and are originally veſted in them, may ſo far have parted with theſe powers, as not to have a conſtitutional right of deliberating upon what the legiſlative and executive bodies do, and of reſtraining or puniſhing the perſons, who compoſe theſe bodies. He inſtances, at firſt ſetting out, in the caſe of a monarchy, and endeavours to ſhew, that the conſtitutional legiſlative and executive powers may be given up by the people, and be entruſted by them to a ſingle perſon: but he obſerves, before he concludes what he had to advance upon this ſubject, that he deſigned his reaſoning ſhould be general, and ſhould be extended to all other forms of government whatſoever. Nor does he

attempt

attempt to prove, even whilſt he dwells upon the inſtances of monarchies, that any ſuch conſtitution, as he there deſcribes, is actually eſtabliſhed in any country whatſoever. If ſuch a conſtitution is poſſible in the nature of the thing, it is enough for his purpoſe. And his unthinking commentator, whilſt he deſigned to oppoſe his principles, grants him not only this, but much more than this; he grants, that the members of a civil community may by their own act make themſelves ſlaves to their civil governours.

We may judge, how well this commentator was qualified to write upon civil power, if we attend to his manner of proving, what Grotius never denys, that there is no kingdom in europe, where the ſubjects are under the abſolute power of a monarch. The germans, ſays he, elect their emperour. The french originally choſe their kings in the firſt eſtabliſhment of the three lines of Meroveus, Charlemayne, and Hugh Capet. And the ſpaniards received the houſe of auſtria upon the title of marriage and compact. It is not worth the while to enquire, how far, in the laſt of theſe inſtances, a claim to govern under the title of having married one, who had a right to govern, can without any intervening act of the people, be called a compact. But in general we may obſerve, that, if all, which he contended for here, is granted; if theſe ſeveral kingdoms were obtained by election or by compact; it will by no means follow, that the kings are not abſolute: ſince upon our commentators principles, compact may not only give a king ſuch an abſolute civil power over his ſubjects, as ſhall be under no conſtitutional control, but may give him likewiſe even private deſpotiſm, ſo as to make them all ſlaves. And if we grant ſtill farther, that none of theſe

monarchs have abſolute civil power, it will not follow, that Grotius is miſtaken, when he maintains, that an abſolute monarchy is a poſſible form of civil government.

Gronovius indeed aſks, what occaſion there is for concerning ourſelves in europe with ſuch a queſtion as this? But the anſwer is obvious. We have as much to do with this queſtion in europe, if we have a mind to underſtand the origin and nature of civil conſtitutions, and to ſettle the meaſures of that obedience, which we owe to our civil governours, as if we lived in aſia. For certainly the meaſures of conſtitutional obedience to our governours, be they monarchs, or nobles, or our own repreſentatives with legiſlative authority, will not be the ſame, if the people in their collective body have not every where and without exception a conſtitutional power of reſtraining and puniſhing their governours, that they would be, if this collective body had ſuch a conſtitutional power.

It was not material, whether our author examined this queſtion in the inſtance of an abſolute monarchy, or in the inſtance of any other form of a legiſlative body. Though perhaps what he ſays upon it would have been leſs objected to, if he had made choice of ſome other inſtance: and he would, beſides this, have had the farther advantage of not being led to explane the occaſions of eſtabliſhing abſolute monarchies; upon which ſubject he has advanced ſome poſitions, that moſt of his readers are diſpleaſed with.

The point, which he wants to eſtabliſh, when it is ſtripped of this circumſtance, is, that, unleſs in perfectly democratical ſocieties, there is in ſome one man, or in ſome body of men, within the ſociety, a civil deſpotic power

power lodged, which, though it is originally derived from the collective body of the people, is exercised afterwards so far independently of them, as not to be subject to any constitutional restraints from that body. Despotic power is a bad name indeed, because it is commonly used to convey the notion of what is arbitrary and tyrannical. But this bad meaning will be taken off, if we call it civil despotism, which is the civil power originally inherent in the community or collective body itself, but entrusted by their consent, either express or tacit, with the governing part of each community. What Grotius principally contends for is, that this power may be so delegated by the collective body, as to leave that collective body no share in it. When this has been done, the people, he says, have no constitutional right to restrain or punish those governours, who are entrusted by them with this power. But then, where the constitution is broken, or where the constitutional governours pretend to and make use of a power, which does not belong to them, a power of causelessly and arbitrarily oppressing the people, which is no part of civil power; our author, as far as appears, does not contend, that in these circumstances the people have no natural right of doing themselves justice. And certainly we ought very carefully to distinguish between a constitutional right in the people to interfere in the affairs of government, to direct or restrain the legislative and executive bodies in the exercise of the power, that is entrusted with such bodies, and a natural right in the people to maintain the constitution, as it was at first settled, when any attempts are made to alter it; to resume the legislative and executive power, when the constitution has been broken; or to defend themselves against all unsocial or unconstitutional oppression.

Grotius,

Grotius, as I obſerved before, having choſen to explane what he has to ſay upon this ſubject, in the inſtance of monarchy, was led to ſay ſomething concerning the poſſibility of introducing ſuch a form of government, not only in the nature of the thing itſelf, but in fact too. As to the poſſibility, in the nature of the thing, of entruſting the whole civil power, both legislative and executive, in the hands of one man, ſo as not to ſubject him to any conſtitutional reſtraints from the collective body of the people; the general conſideration, by which ſuch a conſtitution of government is ſhewn to be conſiſtent with the nature of civil ſociety, is the ſame, that muſt be made uſe of to ſhew, that any other form of government is poſſible, that the legislative and executive power are ſubject to no conſtitutional reſtraints from the collective body of the people, when they are entruſted with any number of men, of any denomination whatſoever, leſs than the majority of the community. It might be objected indeed, that we cannot well preſume, that any nation would ever conſent to truſt the whole civil power with any one man for reaſons, which have been taken notice of already. [a] But to this our author replys, that the objection is nothing to the purpoſe of the point in hand: for we are not enquiring, what form of government may be preſumed to have been eſtabliſhed, where the matter is doubtful; but what form may be eſtabliſhed conſiſtently with the nature of civil ſociety. You may urge, that this form is attended with many inconveniences: but all the inconveniences, which attend it, as they will never prove it to be impoſſible in fact, ſo much leſs will they prove it to be impoſſible in its own nature. All forms

[a] Grot. L. I C. III. § VIII.

of

of government have ſome inconveniences attending them. And if the inconveniences of one form would prove it to be impoſſible; the inconveniences of all other forms would prove them all to be impoſſible. As there are many ways of ſetting out in common life, many different trades, profeſſions, or occupations for men to choſe out of, and ſome are in themſelves preferable to others; mankind, in determining what way of life they ſhall enter upon, do not always fix upon that way, which may appear moſt eligible in itſelf. Sometimes their ſituation will not allow them to engage in the profeſſion, which they would otherwiſe have liked beſt. Sometimes they chuſe wrongly for want of deliberating at all. And ſometimes they are miſled in their judgement, when they do deliberate. Juſt ſo it happens, where a nation is to chuſe its form of government. Diſtreſs may compel it to take up with ſuch a form, as in better circumſtances it would not have choſen. It may ſometimes eſtabliſh a form of government too haſtily without deliberating, which is beſt. And ſometimes, even though it ſhould deliberate, it may be miſtaken in its choice. So that notwithſtanding it is true, that abſolute monarchy is not only attended with ſome inconveniences, as all other forms of government are, but that it is attended with more than any other; yet this is no reaſon, why it ſhould be impoſſible for ſuch a form ever to be eſtabliſhed in fact. The nation, where it is eſtabliſhed, may have choſen this form, though they knew it was a bad one: or they may have choſen it, becauſe, either for want of conſideration, or for want of reaſoning upon right principles, they thought it to be a good one. In our endeavours therefore to find out whether it is this, or any other form,

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which has been eſtabliſhed in any nation, we are not to conſider the excellence or advantage of this or of that form, but to attend to the matter of fact, and to enquire what form appears to have been actually eſtabliſhed by the conſent of the people, either expreſs or tacit. Grotius mentions particularly the motive of diſtreſs, when he ſuppoſes it poſſible for a nation to be in danger of being deſtroyed by war, if it does not put itſelf under the abſolute command of ſome able and experienced leader, or to be in danger of periſhing by want, if it does not give up its general right in the civil power to ſome perſon, who will ſupply its wants upon no other terms. He ſuppoſes farther, that an owner of large tracts of land may grant the land out to ſuch perſons, as are willing to ſettle there, upon condition of his having the conſtitutional power of governing all thoſe perſons, conſidered as united into a civil ſociety; or that one, who has private deſpotic power over a great number of ſlaves, that is, of perſons, who are bound to work ſolely for his benefit, may give them their perſonal liberty, ſo as to form them into a civil ſociety upon condition, that they ſhall ſtill be ſubject to his civil deſpotiſm, or be obliged to promote a common good in ſuch a manner as he ſhall direct.

It is not worth our while to examine, how far theſe ſuppoſed caſes may ever happen in fact. The great point, that we want to prove, is, that all governments are not neceſſarily democratical, and that among other forms of government, which are not ſo, and yet are poſſible in the nature of the thing, an abſolute monarchy is one. And if it ſhould be thought farther neceſſary to ſhew, that ſuch a form is poſſible in fact; the conſiderations already mentioned may be ſufficient to ſhew it:

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I mean, that the diſtreſsful circumſtances of a nation may compel the people to chuſe this form; or they may chuſe it capriciouſly without deliberating; or they may chuſe it miſtakenly even after they have deliberated.

What our author ſays, in regard to the poſſibility of eſtabliſhing this or any other particular form of government by conqueſt, is more exceptionable. But I ſhall paſs it over here; becauſe we ſhall have an opportunity in another place of examining into this matter more at large.

However, before we leave this part of our preſent enquiry, it may not be amiſs to remind the reader, that after this or any other ſort of civil conſtitution is eſtabliſhed, it is not neceſſary, that the ſame conſtitution ſhould remain for ever. Since it is derived originally from a compact, either expreſs or tacit, between the legiſlative and executive bodies on the one hand, and the collective body of the people on the other; though both parties are bound by this original compact, as long as it ſubſiſts; yet we ſhall find hereafter, that its obligation may be diſſolved, or that its conditions may be altered.

If we go on to examine the arguments, which Grotius ſays are commonly urged againſt his opinion, we ſhall perhaps be better informed what that opinion is, and ſhall ſee, that inſtead of enquiring here, whether the people have a natural right to reſiſt any unconſtitutional oppreſſion or injury ariſing from the legiſlative or the executive bodies, his deſign was to enquire, whether they have neceſſarily ſuch a conſtitutional right of reſtraining or puniſhing theſe bodies, that no form of government can be conſiſtent with the na-

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nature of civil ſociety, which does not veſt the ſovereign power ultimately in the collective body of ſuch ſociety.

[y] Firſt it is alledged, in contradiction to our authors opinion, that the king, or the hereditary nobles, or the repreſentatives of the people, are all or any of them originally appointed by the act of the people, and derive their power, whatever it is, from the joynt conſent of the civil ſociety, over which they preſide. But ſince in the very notion of an appointment to any office, the conſtituents are ſuperiour to thoſe, who are ſo appointed; the conſequence will be, that in every civil ſociety the people muſt naturally be the ſuperiour party, or that the conſtitutional ſovereign power is naturally lodged with them. In reply to this argument, Grotius indeed inſinuates, that in ſome inſtances, particularly in that of conqueſt, the power of governing may poſſibly not ariſe from the appointment of the people. But as this part of his anſwer is not true, ſo neither is it what he lays the chief ſtreſs upon. He inſiſt rather, that the principle, upon which the argument proceeds, does not hold good univerſally, that a perſon, who is appointed to an office, is not upon that account neceſſarily inferiour to his conſtituents. Indeed where the appointment is precarious, where he holds his office, only at the will of his conſtituents, and may, by the particular nature of ſuch appointment, be removed at their pleaſure, he is at all times ſo dependent upon them, that the power, which they reſerve to themſelves, of diſplacing him, renders them in point of authority ſuperiour to him. But where, though the appointment aroſe originally from their will, the effect of it is afterwards neceſſary; ſo that he is no longer dependent upon their

[y] Grot. ibid.

will for his continuance in the office, which they at firſt gave him; his having been appointed by them does not imply, that they have any authority over him. If we therefore ſet out upon the principle, which Grotius ſeems to doubt of without any good reaſon; I mean, that the governours of a civil ſociety derive their power from the appointment of ſuch ſociety; yet it does not follow, that the conſtitutional power of the people is neceſſarily ſuperiour to that of the governing body, of what ſort ſoever it is, merely upon account of their having been the original conſtituents of that body. In order to prove this, they, who urge the argument, inſtead of reaſoning from the general nature of appointments to any office, ſhould reaſon from the particular nature of an appointment to the office of civil government, and ſhould ſhew, that ſuch an appointment muſt always leave in the hands of them, who make it, a conſtitutional power of diſplacing their civil governours at pleaſure. It is not ſufficient to ſhew, that, where the conſtitution is broken, or where the governours are guilty of great and notorious oppreſſion, the people have a natural right to redreſs themſelves. This would only prove, that the people, as one of the parties in the compact, by which the conſtitution was eſtabliſhed, are naturally obliged to nothing but what is contained in that compact: it would not prove, that they have by that compact a conſtitutional right to check and controul their governours in the exerciſe of the power, which ſuch compact lodged in their hands.

The principle, upon which the ſecond argument, that Grotius examines, proceeds, is, that all government is intended for the benefit of thoſe, who are governed, and not for the benefit of thoſe, who do govern;

vern; and conſequently, as civil government, according to this principle, is intended for the benefit of the people, they muſt neceſſarily be conſidered as the ſuperiour parties in the contract, which eſtabliſhes the form of government: becauſe we cannot imagine, that in any contract the chief regard would be had to the intereſt of any but the ſuperiour party. Our author objects in the firſt place to the principle, upon which the argument proceeds: he does not allow it to be univerſally true, that all government is deſigned for the benefit of thoſe, who are governed, rather than for the benefit of thoſe, who do govern. For in his opinion the benefit of the party, who does govern, is in ſome inſtances the end of introducing the government. Thus the good of the maſter is the end or purpoſe of that authority, which he has over the ſlave: and though it may be poſſible, that the ſlave ſhould be benefited by this authority; yet this benefit of his is accidental; it is not the end, which the authority of the maſter has in view. In other inſtances the mutual benefit of both parties is the proper end of government; particularly it is ſo in that authority, which a huſband has over his wife. But Grotius was aware, that, if we make a very ſmall alteration in the principle here laid down, ſo as to reſtrain it to civil government in particular, inſtead of extending it to government in general, theſe inſtances would be nothing to the purpoſe. If we ſay, that all civil government has the good of thoſe, who are governed, and not of thoſe, who do govern, for its principal end; the argument will ſtand clear of any exceptions, that may be drawn from theſe examples: it will then be nothing to the purpoſe to urge, that it is not ſo in other ſorts of government, in that of a maſter, or in that of a huſband.

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Our author therefore goes on to offer his reaſons, why this principle ſhould not be looked upon as neceſſarily true even in civil government. Where civil power, he ſays, is acquired by conqueſt, the end, which the conquerour has in view, when he eſtabliſhes himſelf in the poſſeſſion of ſuch power, is his own benefit. And yet ſuch an eſtabliſhment is not neceſſarily a tyranny: becauſe there may poſſibly be no injuſtice, either in the eſtabliſhment of this power, or in the exerciſe of it, after it is eſtabliſhed: and the word tyranny, as it is commonly uſed, includes the notion of injuſtice. We will not ſtop here to enquire, how far ſuch a power may be eſtabliſhed by conqueſt, nor how far it may be exerciſed without injuſtice; for without entering into theſe queſtions at preſent, we may obſerve in reply to what our author here advances; that, if he will not allow us on the one hand to call a power of governing, introduced with a view only to the governours benefit, by the name of tyranny; we cannot allow him, on the other hand, to call it civil power. Where the benefit or intereſt of the governour is the chief end propoſed; ſo that they, who are under his authority, are obliged to direct their actions to the advancement of this end; the power, by whatever means acquired, or however lawful, is private deſpotiſm and not civil power. We might therefore, notwithſtanding this inſtance, ſtill maintain, that all civil government is introduced rather for the benefit of thoſe, who are governed, than of thoſe, who do govern.

This principle however, though Grotius has not diſproved it, is not true in the manner, in which it is here expreſſed. Civil government, though it is intended for the good of thoſe, who are govern-

ed, cannot be intended ſolely for their good: it is intended for the common intereſt of the whole ſociety, both of thoſe, who are governed, and of thoſe, who do govern, and not for the ſeparate intereſt of either excluſive of the other. Civil power, in the firſt original of it, reſults immediately from civil union. And this power, if it was to continue in the hands, where it is firſt lodged, that is, in the collective body of the people, is undoubtedly deſigned to promote the ſame end with civil union, that is, the common benefit of the whole body politic, and of the ſeveral parts of that body. But when any civil ſociety has gone farther, when it has by a ſubſequent compact introduced ſome other form of government, which is not purely democratical, and has veſted its civil power in the hands of ſome particular part of ſuch ſociety, as in a king, or in the body of the nobility, or in a body of repreſentatives; theſe eſtabliſhed legiſlators do not ceaſe to be a part of the ſociety: and conſequently their benefit is as much in the view of civil power, as the benefit of any other perſons, who belong to it. The original end of civil power is the common benefit of all: and the nature of it is not ſo altered by being committed to a ſelect part of the body, as to confine the benefit, deſigned by it, to thoſe other parts, who have given up their ſhare in it. The collective body of the people might perhaps be induced to commit the ſovereign power to ſome particular legiſlative body, in expectation, that it would be exerciſed more to their advantage, when ſo diſpoſed of, than if they had retained it in their collective body. But they would have little reaſon to expect ſuch advantage, if by this act they deſigned to ſeparate their intereſt from the intereſt of the legiſ-

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lative body, conſidered as a part of the ſociety, whether it conſiſts of a king only, or of a number of hereditary nobility, or of repreſentatives, who are choſen for a term of years, or of all theſe together. I ſay; conſidered as a part of the ſociety; becauſe though the end of civil ſociety is the common benefit of all its parts, as much of the governing as of the governed part; yet when the governours ſet up a ſeparate intereſt of their own, as if they were not parts of the ſociety; neither the end of inſtituting a form of government, nor the end of uniting into a civil ſociety, can bind the people to purſue this ſeparate intereſt to the hurt of the public welfare.

Grotius however allows, that the good or welfare of thoſe, who are governed, is principally regarded in moſt inſtances; when civil conſtitutions of government are eſtabliſhed: but then he denies it to be a conſequence of this principle, that the people are in every ſuch eſtabliſhment the conſtitutional ſuperiours. The power of a guardian, as he obſerves, is given him for the benefit and intereſt of his ward. But no one can infer from thence, that the ward is ſuperiour to the guardian. The very notion of a right in the guardian to direct the ward implys the guardian to be the ſuperiour; notwithſtanding he is obliged by the nature of the compact, which gave him this right, to uſe it to the advantage of the ward, by directing him to his own good. But our author is aware, that his own inſtance of guardian and ward may be urged againſt himſelf. It may be ſaid, that, as the guardian, if he abuſes his truſt, may be removed from it; becauſe he was appointed, and had this truſt committed to him, for the benefit of his ward; ſo likewiſe it ſeems reaſonable, that the governours of a ſociety, of what ſort

ſoever they are, ſhould be removed from their truſt, when they abuſe it. Our author replys here, that this may be the caſe of the guardian, becauſe in the ſociety, of which he is a member, he has a ſuperiour: but in civil governours it cannot be the caſe; becauſe there cannot be an infinite progreſſion of civil governours, one ſuperiour to another, but muſt be ſomewhere a laſt reſort, either in ſome one man, or in ſome body of men, who have no ſuperiour but God. This reply however does not clear up the matter; it does not ſhew, that the conſtitutional governours have no conſtitutional ſuperiour, and particularly, that the collective body of the people is not this ſuperiour: ſince we may ſuppoſe this without being reduced to the neceſſity of ſuppoſing farther an infinite progreſſion of civil governours one ſuperiour to another. This collective body may be the laſt reſort; it may be this aſſembly, which has no ſuperiour but God.

We ſhall be the better enabled to form a judgment upon the queſtion now before us, if we attend to the diſtinction, already mentioned, between a conſtitutional ſuperiority in the people, or a conſtitutional right in them to reſtrain or puniſh their eſtabliſhed governours, and a natural right of defending themſelves againſt any unſocial or unconſtitutional injury or oppreſſion brought upon them by ſuch governours, under the pretence of exerciſing that civil power only, with which the people had entruſted them. No one will imagine, that upon every ſuppoſed miſmanagement of the public affairs, or even upon ſuch real miſmanagement, as human nature expoſes a man to in every ſtation, the people have a right to dethrone their king, to degrade their nobles, to diſcharge their repreſentative body, before the term, for which that body was choſen, is expired, and to take

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the civil power again into their own hands, to new model the conſtitution, or to continue the old form of government in a different ſet of men. Yet this muſt be the neceſſary effect of ſuppoſing a conſtitutional ſuperiority in the collective body of the people, under any form of government either ſimple or mixed. The common benefit of the whole, which is the end of civil ſociety, as well as of every ſort of civil conſtitution, may indeed be a ſufficient foundation of a natural right in the collective body to oppoſe unconſtitutional oppreſſion, or to releaſe themſelves from that compact, by which they committed the civil power to their eſtabliſhed governours, when theſe governours have ſo far broken this compact on their ſide, as to make their continuance in power planely and notoriouſly inconſiſtent with ſuch common benefit. If this is all, that is meant by ſaying, that in monarchical conſtitutions the people are ſuperiour to their king, we may allow it. But we ſhould obſerve at the ſame time, that this right is called by an improper name: for inſtead of being a conſtitutional ſuperiority, whilſt the compact, which introduced and eſtabliſhed the form of government ſubſiſts, it ſeems rather to be a natural equality, when that compact is broken.

Others, ſays our author, have ſuppoſed ſuch a ſort of mutual ſubjection between the king and the people, that the people are obliged to obey him, when he governs well, but that he, in his turn, becomes inferiour to them, when he governs otherwiſe. He is here ſpeaking of monarchical conſtitutions in particular; but what he ſays will be applicable to all other conſtitutions, if we only change the word king for the words conſtitutional governours. If they who maintain this opinion,

only meant, that, where ſuch governours command any unjuſt actions, the people are not bound to obey them; he allows, that they would be in the right; but he obſerves at the ſame time, that ſuch a liberty in the people does not imply any civil or conſtitutional ſuperiority in them. In ſome conſtitutions we find the ſovereign power actually divided between the king and the people: but where ſuch a diviſion is deſignedly made, the moſt uſual and the beſt method of making it is, to aſſign certain and determinate limits to their reſpective juriſdictions; to give the king authority in ſome affairs, or over ſome parts of the territory, or over ſome certain perſons; and to give a like authority to the people in other affairs, over other parts of the territory, or over other perſons. But the good or bad management of affairs in any inſtance, eſpecially in matters of civil policy, is ſo problematical; ſo much may be ſaid in any inſtance in oppoſition to any particular meaſure or in defence of it; that this can by no means be fixed, as the proper limit of the reſpective juriſdiction or conſtitutional ſuperiority of the king and the people. Such an uncertain limit, as this, would occaſion endleſs confuſion: it would be always impoſſible to know, which party was uppermoſt, and which party was veſted with the ſovereign power, whether the king or the people: one party having always an opportunity of pretending, that the meaſure in queſtion was a good one; and the other having a like opportunity of pretending, that it was a bad one. But if ſo much confuſion would follow from ſuch a ſort of mutual ſubjection as this; we can have no reaſon to imagine it to be of the eſſence of civil government, that there ſhould be ſuch a mutual ſubjection: becauſe, as civil government was deſigned for

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the common peace and benefit of the ſociety, nothing can be of the eſſence of it, which would neceſſarily introduce confuſion. Thus our author reaſons upon this point. But it will perhaps be made moſt intelligible, if we keep to our former diſtinction, and maintain, that the king, in a monarchical form of government, has the ſovereign power granted to him by compact, which power makes him the conſtitutional ſuperiour of the people. But then, if he breaks this compact, there is no neceſſity, in order to ſupport the right of the people, to maintain, that they become his conſtitutional ſuperiours; it is ſufficient, if ſuch a breach of compact leaves them at liberty to redreſs themſelves by ſuch means, as they have in their power.

Titles or appearances do not determine the nature of of the conſtitution.

XIII. What has been already ſaid may be more than enough to ſhew, that whoever would form a true judgment concerning the conſtitution of civil government, in his own or in any other country, muſt conſider it as a queſtion of fact, and muſt make uſe of the helps of records and hiſtory inſtead of amuſing himſelf with abſtract reaſonings. But it will be neceſſary even in uſing theſe helps to obſerve ſome cautions: becauſe when the facts, by which he is to form his judgment, are before him, it is poſſible for him to form a wrong one.

[z] The firſt caution to be obſerved is, that, in judging what is the civil conſtitution in any country, we ought to be careful, that titles or appearances do not miſlead us.

The titles of emperour, or king, or prince, or duke, for inſtance, are commonly ſuppoſed to imply different degrees of civil power in the perſon, to whom ſuch

[z] Grot. ibid. § X.

titles are reſpectively given. When we find, that the chief magiſtrate in any nation is called an emperour or a king; we are apt to imagine, that ſovereign power goes along with theſe titles, and conſequently, that the conſtitution muſt neceſſarily be monarchical. On the other hand, if he is called a prince or a duke; theſe are looked upon as inferiour titles: and if we were to attend to the title, rather than to the truth of the fact; the inference might perhaps be, that the chief magiſtrate, who has only one of theſe inferiour titles, has not ſovereign power, but that the conſtitution is either mixed or popular. But theſe titles, however they might be intended at firſt, are now uſed indiſcriminately. The loweſt of them is frequently given to perſons, who have ſovereign power, and the higheſt to perſons, whoſe civil power within their own territories is not ſovereign.

In like manner, where we find a ſenate or parliament, by which the people are repreſented; we are apt to conclude from ſuch an appearance, that the people have at leaſt a conſtitutional ſhare in the ſovereign power, if not the whole of it. Such a concluſion however is not always well-grounded. Before we can determine, whether it is or is not well-grounded; we muſt attend, not only to the exiſtence of ſuch a body, but to the buſineſs, in which it is employed. It may be deſigned only to give the king an opportunity of knowing the ſtate of the nation better, than he could have known it otherwiſe; to acquaint him with ſuch publick grievances, as he could not by any other means have been ſo well informed about; or perhaps, by his own appointment, to regiſter his acts in order to make them known to the people in the moſt ready and moſt authentic manner. If this is all, that they have to do; they do not

not ſeem to have any civil power, except what he delegates to them. And the exiſtence of ſuch a body of men would be a very weak argument to prove, that the conſtitution is not abſolutely monarchical. But if, on the other hand, their buſineſs, when they meet, is to raiſe money for the ſupport of the government, to ſettle the uſes, to which ſuch money ſhall be applyed, to exerciſe a part of the legiſlative power, by deliberating concerning the expediency of making any new laws, or of repealing any old ones, and to act with ſuch authority in this point, that nothing can be done effectually without their concurrence; theſe are inſtances of ſovereign power, and will at leaſt prove the conſtitution to be a mixed one.

Tenure of civil power to be diſtinguiſhed from the power itſelf.

XIV. [a] Secondly, the claim, which the king has to the civil power, that is, the tenure, by which he holds this power, or ſo much of it, as the conſtitution gives him, ought to be carefully diſtinguiſhed from the power itſelf.

Other things are held or poſſeſſed by three ſorts of tenure, that is, there are three ſorts of claim, which the owner may have to them. A man may have full property in corporeal things, or he may have a claim of uſufruct in them, or they may be his by a temporary tenure. Of theſe three ſorts of tenure, that of full property is the higheſt in degree, and may therefore be called the ſupreme tenure. The other two, an uſufructuary or a temporary tenure, are of an inferiour ſort. In corporeal things, the claim of the owner, or the tenure, by which he holds them, is planely different from the things themſelves: it is impoſſible to confound the field, which a man claims as his own, with the right,

[a] Grot. ib. § XI.

by

by which he claims, or the tenure, by which he holds it. The ſame field may at different times belong to one man in full property, to another by uſufruct, and to a third for a term of years. But it is plane, that the field and the tenure, by which it is held, are diſtinct from one another: ſince the field is ſtill the ſame, whilſt the claim to it has undergone theſe ſeveral changes. The ſame obſervation is applicable likewiſe to incorporeal things, in [b] which number civil power is to be reckoned. And the caution, which our author here recommends, is, that we are not to judge of the power of a king from the tenure, by which he holds it, or by the nature of his claim to it. He may have the ſupreme claim to it, or may hold it in full property, and yet the power ſo holden may be leſs than ſovereign: or he may hold it by uſufruct, or for a time only; and yet, though the claim is of the inferiour kind, the power may be ſupreme.

It is queſtioned indeed, whether any one can have full property in civil power, whether a kingdom can be patrimonial, or whether the right to govern a civil ſociety can poſſibly be alienable, at the diſcretion of the poſſeſſor, as his right to any other eſtate, or to any other part of his patrimony is. Certainly, when the people have veſted civil power in any particular man, or body of men, this grant of theirs does not imply, that ſuch power is alienable, that the man or the body of men, in whom it is ſo veſted, have a right, either to exerciſe it themſelves, or to alienate it to any one elſe, at their own diſcretion. Since a power to govern does not imply a power to chuſe and appoint a governour; a king may be inveſted even with the ſovereign power of go-

[b] See B. I. C. II. § X.

verning,

verning, without having full property in that power, or without having a right to alienate it: becauſe transferring this power from himſelf to any one elſe is in effect chuſing and appointing a governour.

But this is not the point in queſtion. Grotius no where ſuppoſes, that whoever is poſſeſſed of civil power, muſt neceſſarily have a right to alienate that power. On the contrary, the diſtinction, which he makes, between the power itſelf and the claim to ſuch power, ſufficiently ſhews it to have been his opinion, that a king may be poſſeſſed even of abſolute power without having full property in it. It is granted therefore, that there is nothing in the nature of civil or even of ſovereign power, which will neceſſarily give any perſon, in whom ſuch power is veſted, a right to alienate it. If nothing more is done, than merely to lodge that power in his hands, he will have no patrimonial right to it; for the reaſon already mentioned: a right to govern by no means includes or ſuppoſes a right to appoint another governour. But though a grant of civil power, from the people to their king, does not imply, that he ſhall have a right to alienate ſuch power to whom he pleaſes, and conſequently though there is, in the original ſettlement of a conſtitution, no occaſion for the people expreſsly to ſtipulate, that the ſovereign power ſhall not be alienable by him or them, to whom they entruſt it; yet it may ſtill be a queſtion, whether it is impoſſible for the people to make it ſo; whether it is inconſiſtent with the nature of the thing for the people, when they veſt the civil power in the hands of a king, or of a body of nobility, or even of their own repreſentatives, to give them at the ſame time a right to diſpoſe of their

power,

power, either to exerciſe it themſelves or to alienate it to ſome one elſe.

The general objection, againſt the notion of a plenary right in civil power, which [c] Grotius mentions, does not ſeem to be deciſive againſt his opinion, that ſuch a right is poſſible. Free men, ſuch as the members of a civil ſociety muſt be, are not, it is ſaid, matter of commerce, they cannot be bought and ſold, or alienated and acquired, as ſlaves are. This is undoubtedly true. When the civil government is transferred from the preſent poſſeſſor to ſome one elſe; he, who acquires the power ſo transferred, cannot acquire the ſame power, which the purchaſer of a ſlave acquires over the perſon of the ſlave. But this is no reaſon, why he may not ſucceed by an act of his predeceſſor into the ſame power, which his predeceſſor had. It is not poſſible, that by ſuch act he ſhould ſucceed into more: and if he does not, the ſubjects will be juſt as much free men under the new governour, as they were under the old one. To ſuppoſe, that, if a king has a right to appoint his ſucceſſor, or to alienate his kingdom, he muſt neceſſarily have a right to change the conſtitution, to give ſuch ſucceſſor a greater power, than he had himſelf, or perhaps a power even of joyning it as a province to dominions of his own, is ſuppoſing what is by no means contained in the notion of a patrimonial kingdom, and what Grotius particularly deſigned to guard againſt in this caution; where he has taken care to obſerve, that plenitude of property is ſo far from implying plenitude of power, that, if we were to enquire into facts, we ſhould find, the inferiour ſorts of civil power as marquiſates or dukedoms to be more frequently alienable than ſovereign power.

[c] L. I. C. III. § XII.

We indeed in this kingdom have been brought up under ſuch a conſtitution of government, as will make us wonder at the notion of any kingdoms being patrimonial, if we have never looked beyond what paſſes amongſt ourſelves. But whoever has looked abroad, and has conſidered with the leaſt degree of attention what has paſſed in other kingdoms even in europe will find, that, in the common opinion of mankind, kingdoms may be alienable, in like manner as other inheritances are. It can ſcarce admit of any queſtion, whether they are ſo in themſelves. [d] Mr. Locks reaſoning upon this head ſeems to be deciſive. "The legiſlative cannot transfer the power of making laws to any other hands. For it being a delegated power from the people, they, who have it, cannot paſs it over to others. The people alone can appoint the form of the commonwealth, which is by conſtituting a legiſlative, and appointing in whoſe hands that ſhall be, and when the people have ſaid, we will ſubmit to rules and be governed by laws made by ſuch men, and in ſuch forms, no body elſe can ſay, other men ſhall make laws for them; nor can the people be bound by any laws, but ſuch as are enacted by thoſe whom they have choſen and authoriſed to make laws for them. The power of the legiſlative, being derived from the people by a poſitive voluntary grant and inſtitution, can be no other, than what that poſitive grant conveyed, which being only to make laws, and not to make legiſlators, the legiſlative can have no power to transfer their authority of making laws, and place it in other hands."

But then, though a king with legiſlative power cannot in virtue of ſuch legiſlative power alienate his

[d] Locks works V. II. p. 215.

kingdom,

kingdom, ſo that ſovereignty in government does not imply ſuch ſovereignty to be alienable, or plenitude of power does not imply plenitude of property in ſuch power; yet there is ſtill a farther queſtion, whether the people, who delegated the ſovereign power, could not likewiſe confer a right upon the perſon or perſons, to whom they delegated ſuch power, of making it over to others? whether, as they gave the legiſlative power, they could not likewiſe give a right of transferring that power? If they could, then kingdoms, though they are not patrimonial in themſelves, may be made ſo by the conſent of the people, not only by a concurrence at the time of transferring the ſovereign power from the preſent poſſeſſor to his ſucceſſor, but by a prior grant at the time of delegating the ſovereign power to ſuch preſent poſſeſſor, or at any other time.

There are certainly many inconveniences, which would probably attend ſuch an eſtabliſhment as this; but none of them ſhew it to be impoſſible. The danger, which a nation is in, of being made a province, is one of theſe inconveniences, and has been mentioned already. And upon that occaſion we obſerved, that plenitude of property in civil power would not give a king or any other governing body a right to do this: becauſe, though they may have a right given them to alienate the power, which they have, it is no conſequence, that they have a right to transfer a power, which they have not. The ſucceſſor can have no right to any thing, which his predeceſſor had no right to: ſo that, if the nation was no province under the predeceſſor, it cannot of right become one by the transfer of civil power to his ſucceſſor. Another inconvenience, at-

attending ſuch an eſtabliſhment as this, is the poſſibility of the governments coming into improper hands, of its being alienated to ſuch perſons, as are neither agreeable to the people, nor fit for the office. This inconvenience, however great it ſeems to be, though it may ſhew, that no nation would be likely to agree to ſuch an eſtabliſhment; if they were in ſo good a ſituation, as to be able to procure a better; yet will never prove ſuch an eſtabliſhment to be impoſſible, in the nature of the thing. An inconvenience of the like ſort may be apprehended, where the conſtitution has made even a limited, and much more, where it has made an abſolute monarchy hereditary. In the courſe of ſucceſſion the civil power may come into the hands of a perſon, who is neither agreeable to the people, nor fit for the office. And yet the apprehenſion of ſuch inconvenience would be looked upon as a very weak argument to prove, that all laws, which have entailed civil power upon ſuch a particular perſon, and the heirs of his or of her body, are inconſiſtent with the nature of civil ſociety, and conſequently that ſuch laws, however they are made in fact, are in right no laws at all.

It ſeems to be true in general, that what the collective body of the people do by another, whom they have appointed to act for them, is as much their own act, as if they did it themſelves in a full aſſembly. In a kingdom made hereditary by law, whether the king is limited or abſolute, if there is a vacancy of the throne, either by abdication or otherwiſe, the choice of a ſucceſſor, and the future ſettlement of the conſtitution would undoubtedly be binding upon the whole ſociety, if ſuch choice and ſettlement were made by perſons entruſted for that purpoſe by the people; though this choice and this

this appointment were not made in a full aſſembly of the whole collective body. We ſee therefore, that the people may depute perſons to chuſe governours for them, whether ſuch governours have only a ſhare in the legiſlative power, as in limited monarchies, or have the whole of it, as in abſolute ones. And if it is not impoſſible in the nature of the thing, that is, if it is not inconſiſtent with the nature of civil ſociety, for the people to delegate their right of chuſing legiſlators; it can ſcarce be thought impoſſible in the nature of the thing for the people to delegate ſuch a power to the legiſlative in preſent poſſeſſion. So that, though a king or a legiſlative body, merely as ſuch, can have no right of appointing their ſucceſſors, or of transferring their power to ſuch ſucceſſors; yet there does not appear to be any reaſon, why the collective body of the people may not, if they think proper, delegate or convey this right to their king or legiſlative body. And conſequently, though no kingdom, however abſolute the power of the monarch may be, is in its own nature patrimonial; yet a kingdom may be made patrimonial by the conſent of the people: it is poſſible for them, not only by their immediate concurrence to make a transfer of the power of governing them from the preſent poſſeſſor to any other perſon, whom they ſhall expreſsly approve at the time; but it is poſſible for them, by ſome former act of conſent, to have given the preſent poſſeſſor a right to transfer that power to ſuch perſon, as he ſhall approve of: and ſuch a former act of conſent will make his choice in effect their own.

Our authors caution about this matter, may be proper to be repeated here; he obſerves, that this tenure of civil power, which we have called plenitude of property in it,

it, and which is the ſupreme or higheſt tenure poſſible, is no evidence, that he, who holds by it, has plenitude of civil power, or that his power is ſovereign: for the tenure, by which the power is held, and the power itſelf are different things; ſo that a power, which is patrimonial, may as well be an inferiour ſort of civil power as ſovereign or abſolute civil power.

On the other hand; civil power may be ſovereign or abſolute, notwithſtanding it is held by a tenure, which is inferiour to plenary property, by a claim of uſe and profits, or by a temporary claim. Where the conſtitutional laws of a civil ſociety have ſettled the ſucceſſion to the crown, and have determined beforehand to whom it ſhall deſcend upon every demiſe; the preſent poſſeſſor, as our author ſays, holds his power by a tenure of uſufruct; the uſe and profits of it are his to enjoy, but the thing itſelf is not his to diſpoſe of. In like manner; where the crown is elective, and upon every vacancy the people have a conſtitutional right to chuſe the ſucceſſor; the preſent poſſeſſor holds by a claim of uſe and profits.

Perhaps in this latter inſtance the tenure may rather appear to be temporary: ſince the right continues only for a certain term, for the life of the preſent poſſeſſor, and no longer. Whereas in the former inſtance of hereditary kingdoms the right continues to himſelf and ſuch heirs, as the laws have limited; ſo that thoſe heirs, by the aid of ſuch laws, claim in inteſtate ſucceſſion: and conſequently the thing ſo claimed ſeems to be his by more than a temporary right; it is tranſmitted from him to his heirs by the aid of the law, though he has no right to tranſmit it by his own act to whom he pleaſes.

It is not however worth the while to enquire particularly, whether the tenure in elective kingdoms is of the temporary, or of the uſufructuary ſort. All that is neceſſary for us to obſerve here is, that an uſufructuary claim to civil power is no evidence, that the power ſo held is not of the higheſt ſort. The right, by which a thing is claimed, is different from the thing itſelf: the nature of the claim therefore does not determine the nature of the power, which is claimed: and he, who ſhould know, that the civil power in any country belongs to the king by a claim of uſe and profits only, and not by a claim of full property, will have gone but a very little way towards determining, whether the conſtitutional power of ſuch king is abſolute or limited; whether the ſovereign power is veſted in him, or in the people, or in the nobles, or in all together. For as patrimonial civil power may be of the inferiour ſort; ſo uſufructuary civil power may be ſovereign.

If we look upon the power of an elective king to be temporary; this might ſerve as an inſtance to ſhew us, that it is poſſible for civil power, though it is given only for a time, to be abſolute as long as it laſts: ſince it is poſſible for the people, though they chuſe their king only for life, to make his power abſolute, as long as he lives. Grotius here makes uſe of the inſtance of the roman dictators power, in the beginning of that commonwealth, before the horatian law had made it capital to create any magiſtrate, that ſhould not be ſubject to appeal. Nor can it be maintained, in oppoſition to this inſtance, that the dictators power, before this law was made, could not be abſolute, merely becauſe it was only temporary: ſince the nature of a thing does not depend upon the time of its continuance. If civil power may be abſolute, when it continues for the life

of a man and of his heirs; it may likewiſe be abſolute, when it continues only for ſix months. The way to judge, whether it is ſo or not, is to conſider the effects of it. Now the effects of ſovereign power are ſuch, that no other civil power within the ſtate can make them void. And as the effects of the dictators power were of this ſort, as long as that power laſted; the power, which produced theſe effects, could not be leſs than ſupreme, notwithſtanding the claim to it was only temporary. If indeed we conſider the majeſty or dignity of the perſon, who is inveſted with ſuch temporary power, inſtead of conſidering the power itſelf; it muſt be confeſſed, that a temporary magiſtrate has leſs of that majeſty and dignity, than one, who is perpetual: not becauſe his power is leſs in itſelf; but becauſe the people cannot readily bring themſelves to pay as much reſpect and reverence to one, who, though he is now their ſuperiour, will ſoon be reduced to a level with themſelves, as they willingly pay to one, who will be their ſuperiour as long as he lives.

Promiſe or oath of a king may limit his power.

XXV. [a]Grotius has mentioned a third caution, which is to be obſerved in forming a judgment upon the civil conſtitution of government in any nation, and of the power, which the people have lodged in the hands of their king. The caution is, that the power of the king may be ſovereign, ſo as not to be conſtitutionally ſubject to the control of the people, notwithſtanding he bound himſelf to the people by ſome promiſe or oath, when he accepted the crown, not merely to obſerve the law of nature or the law of God, which he would have been obliged to obſerve, without ſuch engagement, but to obſerve ſome other rules, or to act

[a] Ibid. §XVI.

under ſome other reſtrictions, which otherwiſe would not have been binding upon him.

We ſhall the better underſtand whether we can allow this caution to be well grounded, if we conſider it both where the promiſe or oath is required of him by the immediate act of the people, or by ſome fundamental law of the ſociety, as a neceſſary condition of his receiving the civil power, with which he is about to be inveſted; and likewiſe where ſuch promiſe or oath is wholly voluntary in him, and is matter of his own mere grace and bounty.

In the former caſe; if the conſtitutional laws require him to promiſe or ſwear to obſerve certain rules in his future government; or, where there are no ſuch laws, if the people, when they make over the civil power to him, impoſe this promiſe or oath upon him, and will not lodge it in his hands upon any other terms; I do not ſee, how ſuch a promiſe or oath can be conſiſtent with the notion of his civil powers being in all reſpects ſuperiour to that of the people. A promiſe or oath of this ſort is planely a ſtipulation between him and them, and is the method, which they make uſe of, to aſcertain their own conſtitutional rights, as well as to bind him not to exerciſe any power, which ſhall violate thoſe rights. But if they have a conſtitutional authority to require, that he ſhall promiſe or ſwear to obſerve certain rules in his future government; it ſeems abſurd to ſuppoſe, that they have no conſtitutional authority to enforce the obſervance of thoſe rules and to ſee to his performance of ſuch promiſe or oath. And how ſuch an authority, as this, in the people, is conſiſtent with full or abſolute ſovereignty in him, is more than I can underſtand. If indeed any one chuſes rather to ſay, that,

where

where a promiſe or oath of this ſort is not obſerved, the conſtitution is broken, and the people have, though not a conſtitutional, yet a natural right to reſiſt him in the exerciſe of any power, which is contrary to his promiſe or oath; it will ſcarce be worth the while to enter into a diſpute upon this point: ſince the king and the people will in effect be in the ſame ſituation, if the people have a right to reſiſt the exerciſe of ſuch power, whether this right is to be called conſtitutional or natural, whether it ariſes from a ſuperiority of conſtitutional power on their part, or from a breach of the conſtitution on his.

It is only to ſuch a promiſe or oath, as is matter of mere bounty, that a nice diſtinction made by our author can poſſibly be applyed: this diſtinction, if it was ever ſo juſt, is by no means applicable to conſtitutional oaths or promiſes. Let us however examine the diſtinction itſelf, and perhaps we ſhall find, that it has no foundation. An oath or promiſe, ſays Grotius, which is taken by a king, when he comes to the government, may either be ſuch an one, as reſtrains him in the exerciſe of his civil power in ſome inſtances, or ſuch an one, as gives up the power itſelf in the like inſtances. Suppoſe him to promiſe, that he will confine certain offices of profit or truſt to perſons of ſuch a rank, or of ſuch qualifications, as the promiſe ſpecifies; or that he will not raiſe any taxes, or impoſe any new tolls or cuſtoms, but ſuch as have been uſed to be paid. By a promiſe of this ſort he reſtrains himſelf, according to our authors opinion, in the exerciſe of his power, but does not part with the power itſelf. Whatever therefore he does afterwards, which is contrary to ſuch a promiſe as this, will be wrong. But then, ſays our author, as he has retained the power of acting, though he has limited himſelf as to the exerciſe of it, what is ſo done will not be

void. And from theſe principles Grotius concludes, that ſuch a promiſe or oath does not make his civil power leſs than ſovereign, as it does not appear to affect the validity of his acts at all, and much leſs does it imply or create in the ſociety any power ſuperiour to his own. But ſuppoſe, as our author goes on, that his promiſe or oath is conceived in ſuch terms, as to contain not merely the rules, by which he engages to act in certain inſtances, but a renunciation likewiſe of the power of acting otherwiſe, than the promiſe or oath expreſſes: whatever is done contrary to a promiſe or oath of this ſort will indeed be void. But then Grotius reminds us, that civil power is ſovereign, when none of its acts can be made void by any other power within the ſociety, and that in the inſtance before us the acts of a king, which are contrary to ſuch promiſe or oath, are not made void by any other power within the ſociety, but are void in themſelves, upon account of a defect of power in him, who does them. His concluſion therefore is, that the invalidity of theſe acts is no evidence, that there is any power within the ſtate ſuperiour to his own, and conſequently is no evidence, that his power is not ſovereign. But there does not ſeem to be any foundation for diſtinguiſhing here between a promiſe or oath, which limits the king in the exerciſe of his power, and a promiſe or oath, by which he renounces the power itſelf. Every promiſe, if it has any effect at all, muſt be a renunciation of power, as far as it extends. A promiſe in its own nature affects the liberty of the promiſer, by obliging him to act in a particular manner: and it is impoſſible to conceive, how he ſhould have obliged himſelf to act in a particular manner, without having given up his liberty or

power

power of acting in any other manner. All promiſes therefore or oaths, though they are voluntary on the part of the king, are renunciations of his power to govern by any other rules, than thoſe, which he has promiſed or ſworn to obſerve. The conſequence of which is, that all ſuch acts, as are contrary to theſe rules, will be void.

This Grotius allows to be a diminution of his power as to the extent of it; though he thinks it ſtill continues the ſame as to its degree. To clear up his meaning in this ſecond diſtinction we will ſuppoſe the two following caſes of a promiſe or oath. Firſt; the future king may merely renounce his right to do certain acts, which, by virtue of the civil authority veſted in him, he might otherwiſe have done. Or ſecondly; he may not only renounce his right to do thoſe acts, but may give the people a right to control him, if ever he does them, by agreeing, that they ſhall never be done, without their conſent, ſignifyed either by themſelves or their repreſentatives. Whatever he does contrary to his promiſe in either of theſe inſtances will be invalid. In the firſt of them it is, that Grotius ſuppoſes what he does to be invalid without any diminution of his ſovereignty as to the degree of it; becauſe his acts, done contrary to his promiſe, become invalid by a defect of power in himſelf, and not by the ſuperiour power of any one elſe. In the ſecond inſtance his power cannot well be thought ſovereign, becauſe he veſts that power in the people, which he renounces for himſelf, and by that means eſtabliſhes a power within the ſociety, by which his own acts may be made void. When our author allows, that the promiſe or oath of a king, in the firſt of theſe caſes diminiſhes his power, as to its extent, but not as to its

degree; he ſeems to mean, that where the king, before he enters upon his office, has, as the caſe is put, merely renounced the power of doing ſome acts, which he otherwiſe might have done, without veſting the power ſo renounced in the hands of the people; his power is neceſſarily abridged as to the extent of it; becauſe ſome acts, which he does, will be void in conſequence of his promiſe, though they would not have been void, if no ſuch promiſe had been made. But then in the mean time his power is not diminiſhed as to the degree of it; unleſs he tranfers to the people what he renounces for himſelf; becauſe, unleſs he does this, there will be no power in the ſtate ſuperiour to his own.

Yet after all, this ſecond diſtinction is of no weight in the preſent queſtion. The whole civil power is originally in the body of the ſociety. Suppoſe therefore, that they either elect a king, and would veſt the whole civil power in his hands; or ſuppoſe, that they have formerly made ſuch a delegation of civil power to their king, and have eſtabliſhed it by law to his heirs after him; if any promiſe of ſuch king to the people, when he takes the government upon him, is conſidered as a renunciation of any part of the civil power, it muſt naturally give or rather return ſuch power to the people, from whom it originally came. It is impoſſible for the civil power not to exiſt ſomewhere in all its parts: if he has it not, the people muſt have it. Certainly therefore, if the conſtitution of government in any country was at its firſt eſtabliſhment deſigned to be abſolutely monarchical; ſuch a promiſe prevents it from being ſo: and if this form was once eſtabliſhed, ſuch a promiſe from any ſubſequent monarch muſt change the conſtitution, and reſtore to the people ſo much of the civil power, as is contained in the promiſe.

XVI.

Mixed conſtitutions.

XVI. After what has been ſaid already, we need not enlarge upon the fourth caution, which [c] Grotius propoſes to be obſerved in judging of a civil conſtitution: the caution is, that though ſovereign power ſeems in its own nature to be ſimple or indiviſible, as being the act of the common underſtanding directing what is to be done, yet it is not neceſſary, that this ſhould be the underſtanding of any one man as in monarchies, or of any ſingle body of ſelect men, as in ariſtocracies, or of the repreſentative body of the people, as in democracies: it may be the joynt underſtanding of a mixed body compoſed of any two or all of theſe. So that all civil conſtitutions are not neceſſarily one of the three ſimple ſorts: and in moſt nations we ſhould find it very difficult, in ſome nations we ſhould find it impoſſible, to reduce the conſtitution to one or other of theſe ſorts, and ſhould form a wrong judgment about them, if we imagined them capable of being ſo reduced.

Civil conſtitutions may be altered.

XVII. To theſe cautions we may add a fifth, which is, that when, in reading the hiſtory of a nation, we have diſcovered what its civil conſtitution was in any former period of time, we muſt not from thence conclude it to be the ſame at preſent: becauſe civil conſtitutions like all other things are ſubject to alterations. The means, by which alterations may be produced in them, ſhall be enquired into hereafter.

[c] ibid. § XVII.

CHAP.

CHAP. V.

Of the changes, which are produced in the rights of individuals by civil union.

I. *Rights of mankind how changed in civil ſociety.* II. *Right of private defence how reſtrained in a ſtate of civil ſociety.* III. *Origin and nature of civil juriſdiction.* IV. *How civil juriſdiction ceaſes.* V. *Right of defence, where civil juriſdiction ceaſes in fact.* VI. *Right of defence, where civil juriſdiction ceaſes of right.* VII. *Right of reparation how ſubjected to civil juriſdiction.* VIII. *Civil juriſdiction in reſpect of reparation cannot ceaſe in fact.* IX. *Right of puniſhing how reſtrained by civil juriſdiction.* X. *Difference between juriſdiction in matters of damage and of puniſhment.* XI. *Right to puniſh how veſted in the civil magiſtrate.* XII. *How far civil juriſdiction may ceaſe in reſpect of the right to puniſh.* XIII. *Natural principles applicable to ſocial puniſhment.* XIV. *Actions not puniſhable by individuals may be puniſhable by magiſtrates.*

Rights of mankind how changed in civil ſociety.

I. THE rights of mankind, when we conſider them as members of a civil ſociety, are different in many inſtances from what they were in a ſtate of nature. This difference ariſes either from civil union, or from civil laws. Some of the rights of mankind, when they are united into a civil ſociety, are made different from what they were in a ſtate of nature by the immediate operation of that compact, which forms or unites them into ſuch a ſociety. Whilſt ſome of them undergo no immediate alteration by this compact, but only are ſubjected

jected by it in general to the authority of civil laws: ſo that ſuch actual alterations, as they undergo afterwards, are produced immediately by theſe laws, and only remotely by civil union. After a number of individuals have agreed to joyn together into one body, for the purpoſe of ſecuring one another, by their common force, againſt injuries, they are not ſo free to act for themſelves for this purpoſe, at their own diſcretion and by their own private force, as they were before they made this agreement. [a] But ſince many of the rights of mankind conſiſt in nothing elſe but in the liberty of doing certain actions; it follows, that, in whatever inſtances their liberty of acting for themſelves is reſtrained by ſuch an agreement, their rights by this act of civil union become different from what they were in the liberty of nature. But mankind form themſelves into civil ſocieties, not only for the purpoſe of ſecuring themſelves againſt injuries, but for the farther purpoſe of advancing a general good. The compact therefore, which form or unites them into ſuch a ſociety, binds them to act for the general good by following ſuch rules, as the common underſtanding of the ſociety ſhall judge to be neceſſary for obtaining it. In conſequence of this obligation their liberty of acting is liable to be reſtrained by theſe rules, that is, by the civil laws of the ſociety, in many inſtances, where the mere act of civil union had laid it under no particular reſtraint. All ſuch reſtraints upon their liberty, as ariſe from this cauſe, are ſo many changes produced in their rights by the immediate operation of civil laws.

Right of private defence how reſtrained in a ſtate of civil ſociety.

II. Civil union lays the foundation of all the alterations, that are made in the rights of individuals, after they

[a] See B. I. C. II. §III.

they are become members of a civil ſociety, by ſubjecting them to ſuch future reſtraints as ſhall ariſe from the laws of that ſociety. But the rights, that are actually altered by civil union only, without the aid of civil laws, are chiefly ſuch, as ariſe from an injury, either before or after it is committed. [b] We have already ſeen at large what theſe rights are: ſo that it will be ſufficient here only juſt to mention them. Individuals, in a ſtate of natural liberty, when they find themſelves to be in danger of ſuffering an injury, have a right, before it is committed, to defend themſelves againſt it at their own diſcretion and by their own force. They have likewiſe, after an injury is committed, a right to uſe the ſame means, both to obtain reparation for the damages, which they have ſuſtained by it, and likewiſe to inflict puniſhment upon the authors of it. Some alterations are made in each of theſe rights by civil union: and we are now to enquire what thoſe alterations are.

Individuals are reſtrained by the act of civil union from defending themſelves againſt an injury by their own private force and at their own diſcretion, and are obliged to apply to the ſociety, or to the civil magiſtrate acting for the ſociety, to defend them by the uſe of the common force under the conduct of the common underſtanding. It is the more neceſſary to enquire into the manner, in which this reſtraint upon the right of private defence is produced; becauſe moſt of the writers upon natural law ſeem rather to take it for granted, that there is ſuch a reſtraint, than to explane the cauſe of it.

This enquiry might be ſoon brought to a concluſion; if it could be ſhewn, that individuals explicity renounce

[b] See B. I. C. XVI. XVII. XVIII.

their

their right of defence, and transfer it from themſelves to the civil magiſtrate, by the ſocial compact, that is, by the compact, which unites them into a civil ſociety. By this compact all the individuals bind themſelves to act with their joynt force for the preſervation and ſupport of their rights: and all of them bind themſelves likewiſe to advance and ſecure the general good by following ſuch rules, as the common underſtanding ſhall preſcribe to them for this purpoſe. Theſe two parts make up the whole of the ſocial compact: and, whatever may be implyed, there is certainly no renunciation of their right of private defence, nor any transfer of it from themſelves to the civil magiſtrate, explicitly contained in either part of it.

After the civil laws of any nation have commanded the ſeveral members of it not to defend themſelves by their own private force, but to apply to the civil magiſtrate for this purpoſe; their right of private defence will then undoubtedly be reſtrained. For one part of the ſocial compact ſubjects mankind in a ſtate of civil ſociety to the authority of civil laws, by binding them to follow ſuch rules, as the common underſtanding ſhall preſcribe for the advancement and ſecurity of the general good. But this does not come up to the point in queſtion, nor to the common opinion about it. We are not enquiring, whether the right of private defence may be reſtrained by laws, which become binding in conſequence of civil union; the point in queſtion is, whether it is not reſtrained by the mere act of civil union without the aid of ſuch laws. And the common opinion about this point is, that mankind, conſidered merely as members of civil ſociety, have no ſuch right of private defence; whether any expreſs laws have been made to reſtrain it, or not.

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The other part of the ſocial compact places each individual under the protection of the whole body, by binding them all to act with their joynt force for his defence. But if we look no farther than his right to protection, it will be no direct conſequence, that by acquiring this right his own right of private defence is loſt or reſtrained. For there is no direct inconſiſtency between his having a right to prevent or to repel an injury by his own force, if he thinks it ſafe and prudent to act alone, and his having a right to be aſſiſted by others, if he finds himſelf too weak to prevent or to repel it without their aſſiſtance.

We have[c] elſewhere had occaſion to mention a ſecond ſocial compact, by which, after a civil ſociety is formed, ſome particular civil conſtitution or form of civil government is introduced and eſtabliſhed. It will be needleſs to ſtop here, and enquire, whether this is properly a compact or a civil law. We ſhall have an opportunity of examining into this matter hereafter: and though, if it ſhould then appear to be a law, any reſtraint, that it may lay upon the right of private defence, would rather be a reſtraint ariſing from civil law, than from civil union, yet as we have hitherto called it a compact, we will ſtill ſuppoſe it to be properly a compact, and will call it ſo in the preſent queſtion. By this ſecond compact, which we here conſider as a joynt agreement of the ſeveral members of the ſociety, amongſt other effects, which it produces, civil magiſtrates are appointed for the purpoſes of doing juſtice to all, who are under the protection of ſuch ſociety.[d] It may therefore be imagined, that their agreement to appoint civil magiſtrates, for the purpoſe of defending them, implys their conſent to

[c] See B. II. C. IV. §

[d] Grot. L. I. C. III. §. I.

transfer

transfer their right of private defence from themſelves to ſuch magiſtrates. But not to inſiſt again, upon what has been mentioned already, that their acquiſition of a right to be defended by others, whether by the collective body of the ſociety or by the magiſtrate, does not directly imply the loſs of their right to defend themſelves; we may obſerve, that a civil magiſtrate, or an executive body acting under the checks of the law, is nothing elſe but a part of the ſociety, which is appointed to act for the whole of it. The right therefore, which this ſecond compact conveys to the magiſtrate, though it may be leſs, cannot poſſibly be greater, than what the firſt compact had given to the collective body of the ſociety: ſo that unleſs we can ſhew, that the firſt compact gives the collective body ſuch a right or ſuch a power, as is inconſiſtent with a right of private defence in the individuals; the ſecond compact can convey no ſuch right or power to the civil magiſtrate.

There is a plane reaſon, why the ſociety will interpoſe and hinder a man from making uſe of his own force upon any occaſion and in any manner, that he pleaſes, againſt thoſe, who are under its protection. The ſociety by receiving them under its protection, obliges itſelf to take care, that they ſhall ſuffer no cauſeleſs harm. And this obligation requires, that it ſhould not allow him, or any one elſe, to act againſt them at diſcretion, even for his own defence: becauſe he might poſſibly do them an injury under the notion of defending himſelf from ſuffering one. He might pretend, that they deſigned, or were preparing, to injure him; when there was no ground for ſuch a pretence: or even if they did deſign to injure him, yet he might be unjuſt, both in his demands of ſecurity, and

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in the manner of enforcing thoſe demands. But this reſtraint, upon his right of private defence, is a reſtraint rather in fact than of right: though the ſociety is obliged to ſecure them, who are under its protection, againſt all cauſeleſs harm; yet he in the mean time, if he is no party to this obligation, will have a right to defend himſelf at his own diſcretion and by his own force. Such a body of men will be ſtronger than he is, and will therefore be able to hinder him from uſing his right: but this is no evidence, that his right does not ſubſiſt: becauſe it is no evidence, that he is obliged to ſubmit to be ſo hindered, if he was ſtrong enough to help it, and thought himſelf to be doing nothing, but what the law of nature will juſtify. Such a reſtraint as this upon his right is no other, than what he might have met with in the liberty of nature; if the individuals, that he had to deal with, happened to be ſtronger than himſelf: they might have ſtopped him from uſing his right of private defence, till they were ſatisfyed, that his defence was lawful: but in the mean time he would not have been obliged to ſubmit to their determination upon this head, but would have been at liberty to determine upon it for himſelf. And as he had a right in a ſtate of equality to judge for himſelf, whether the occaſion of defending himſelf, and the means, that he made uſe of for this purpoſe, were juſtifiable, or not, and to act accordingly; notwithſtanding the individuals that he happened to have to deal with, might be ſtronger than he, and might force him to ſubmit to their judgment; ſo likewiſe in a ſtate of civil ſociety, though ſuch ſociety may in fact ſtop him from defending himſelf, at his own diſcretion and by his own force, againſt any perſons, who are under its protection; yet

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if we conſider it as doing this, only in conſequence of its obligation to guard thoſe perſons againſt ſuffering any cauſeleſs harm, without any conſent on his part, he will ſtill have the right to judge for himſelf and to act accordingly.

We have now ſeen, where any perſon is in danger of being injured by others, that neither the obligation of a civil ſociety to protect them againſt cauſeleſs harm, nor the right, which he has to protection, will take away his liberty of private defence; if the obligation of the ſociety, and his right are conſidered ſeparately. But if his right to protection is a right to be protected by the ſame ſociety, which is obliged to protect them, and we conſider this right, or rather the conditions, upon which he acquired it, and the obligation of the ſociety together; we ſhall then find, in this view of the matter, that the ſame act of ſocial union, which gave him a right to protection, put his liberty of private defence into the hands of the public, or of the civil magiſtrate, who acts for the public. The obligation of the ſociety towards them, if he is no party to it, will produce only a reſtraint in fact, and not a reſtraint in right, upon his liberty of private defence. But whatever act of his makes him a party in this obligation, either as ſuch act declares or as it implys his conſent, that as far as he is concerned, the ſociety ſhould protect them; this act of his gives the ſociety ſuch a right, as reſtrains his liberty of private defence in reſpect of them. The act of civil union, or the act of putting himſelf under the protection of a civil ſociety, is an act of this ſort: it implys his conſent, that as far as he is concerned, the ſociety ſhould guard all others, who are under its protection againſt ſuffering any cauſeleſs harm. And the

reaſon, why his act of civil union, or his act of putting himſelf under the protection of the ſociety, muſt be underſtood to imply, that he conſents to theſe conditions, is, becauſe the ſociety, being from the nature and deſign of it obliged thus to guard all others, who are under its protection, could not conſiſtently with this obligation take him under its protection, unleſs he conſented, and was willing to make himſelf a party, to the ſame obligation.

Upon the whole, an individual is underſtood by the act of civil union to part with his right of private defence; not merely becauſe this act places him under the protection of a civil ſociety; but becauſe it places him under the protection of a civil ſociety, which ſtands engaged to protect thoſe, who are about to do him the injury, as well as to protect him, who apprehends himſelf to be likely to ſuffer it. This act implys, not only that he is willing to acquire a right of being protected by the common force againſt any cauſeleſs harm, which they might poſſibly do him, but likewiſe, that he conſents to their having a right of being protected by the ſame force againſt any cauſeleſs harm, which he might poſſibly do them: it muſt be underſtood to imply ſuch conſent; becauſe without conſenting to their right of protection, he could not acquire a right of protection for himſelf.

From hence it follows, firſt; that the juriſdiction, which a civil ſociety has over any individual in reſpect of the right of private defence, ſuppoſes both the individual who is in danger of being injured, and them likewiſe, who are about to injure him, to be under the protection of one and the ſame civil ſociety: becauſe it is his conſent to their right of protection, which reſtrains his own right of private defence; and this conſent of his is given [illegible] otherwi[illegible]

otherwiſe than by his acquiring a right of being protected by the ſame ſociety, which is obliged to protect them.

Secondly; it follows from hence, that the juriſdiction of a civil ſociety over the liberty of private defence is a right to reſtrain one member, from acting againſt others by his own force and at his own diſcretion, as far as ſuch a liberty of acting might expoſe them to any cauſeleſs harm. And conſequently the ſociety has a right, not only to judge, whether the occaſion of defence is juſt, but likewiſe to take care, that nothing is done unjuſtly even upon a juſt occaſion. After he has made it appear to the ſociety, that he is in danger of ſuffering an injury; the juriſdiction of the ſociety over his right of defence does not ſtop here: he might, if he was left to himſelf, demand ſuch ſecurity, as he has no right to, becauſe he might demand ſuch, as he had no occaſion for; or he might do them more harm in obtaining the ſecurity, to which he has a right, than he ought to do them; becauſe he might do them more harm, than is neceſſary to obtain it. He is therefore not at liberty to make uſe of his own private force, or of any other force, which is managed at his own diſcretion, but is obliged to make uſe only of the common force, which is under the direction of the common underſtanding.

III. [s] Notwithſtanding mankind are now united into civil ſocieties; yet the right of private defence ſtill ſubſiſts, where civil juriſdiction ceaſes. The reader will be better able to underſtand both in what caſes civil juriſdiction ceaſes, in reſpect of the right of private defence, and why in thoſe inſtances this right ſhould ſubſiſt, after civil union; if we firſt enquire into the nature and origin of civil juriſdiction. Origin and nature of civil juriſdiction.

[s] Grot. L. I. C. III. § II.

By civil juriſdiction we mean a right, which a civil ſociety, acting either by its collective body or by its magiſtrates, has to determine any matter, that is in diſpute between two or more perſons, and to compel them by the publick force to ſubmit to its determination, if they do not ſubmit to it of their own acccord.

Juriſdiction is divided into two ſorts, a juriſdiction over perſons, and a juriſdiction over things. Indeed all juriſdiction is ultimately over perſons: for it conſiſts in a right to determine controverſies between two or more perſons, and to compel the perſons concerned in ſuch controverſies to ſubmit to the determination. But a civil ſociety may have this right, either upon account of ſome purely perſonal circumſtances of the parties contending, or upon account of the thing, about which they contend: and to diſtinguiſh theſe two caſes from one another, the former is called a juriſdiction over the perſons, and the latter a juriſdiction over the thing. Where the perſons concerned in a diſpute are obliged from their perſonal circumſtances, if they cannot adjuſt it amicably, to have recourſe to the public for a determination of it; the right of the ſociety, which correſponds to this obligation, is a juriſdiction over their perſons. Where they are obliged thus to have recourſe to the public, not merely becauſe their own perſonal circumſtances oblige them, but becauſe the thing in diſpute is in the power of the ſociety, and can be no otherwiſe claimed by either of them, than by the conſent and under the direction of the ſociety; the right in the ſociety, which correſponds to this obligation, is a juriſdiction over the thing. Thus if we conſider only the immediate cauſe of juriſdiction, as it ariſes either from the perſonal circumſtances of the parties contending or

from

from the ſituation of the thing in diſpute; it may be diſtinguiſhed into theſe two ſorts: but if we conſider its operation, as it binds the parties to ſubmit to the determination of the ſociety, all juriſdiction, in this view of it, may be ſaid to be over perſons.

The foundation of all civil juriſdiction over perſons is laid either immediately or remotely in ſuch a civil union, as places the perſons concerned on one ſide, in any controverſy about matters of right, under the protection of the ſame ſociety, that is to protect the perſons concerned on the other ſide. We have ſeen [f] already, that this is the origin of civil juriſdiction in matters of defence, and ſhall ſee preſently, that it has the ſame origin in matters of reparation and of puniſhment. Many rights of mankind indeed are not brought under the juriſdiction of ſociety immediately by the act of civil union, or merely upon account of the common protection, which the ſame ſociety owes to the perſons in controverſy. But the obligation of civil laws is derived from civil union: and thoſe laws, where the general good requires it, may reſtrain ſuch of their rights, as were not reſtrained by the immediate act of civil union, and may by this means give the ſociety a juriſdiction in many inſtances, where the mere act of civil union had not given it any. Civil juriſdiction over the perſons of individuals muſt either immediately or remotely have its foundation in civil union, or in ſome act, which is equivalent to it. For ſince all men are [g] naturally equal, and are naturally at liberty to judge and to act at their own diſcretion, no civil magiſtrate and no civil ſociety can have any right to judge and to act for them, or to reſtrain them from judging and acting for themſelves;

[f] See § II. [g] See B. I. C. X. § III.

unleſs they have ſome way or other conſented to give the magiſtrate or the ſociety this right. And this conſent appears no otherwiſe, than by their joyning themſelves to the ſociety, or however by their putting themſelves or their rights, by ſome means or other, under the protection of the ſociety. The juriſdiction, which a civil ſociety has over things, as far as it affects any perſon, who is not under the protection of that ſociety, may be thought an exception to this rule: but we ſhall ſee preſently, that this is rather a natural, than a civil juriſdiction. It may be called a civil juriſdiction, as it belongs to a civil ſociety, but it is in fact no other right, than what in ſome ſort individuals have in the liberty of nature, and ariſes rather out of property than out of civil union.

When [b] a number of individuals have united themſelves by conſent into one body, and have ſettled upon any tract of land; ſuch a collective body, by this act of ſettling there or by this occupancy in the groſs, acquires a general property in the land. This general property of a civil ſociety is like the particular property of individuals in a ſtate of independency. As the particular property, which an individual has in a parcel of land, after he has ſeized upon it, is a right of ſuch individual to exclude all other individuals, whether they are few or many, from having any thing at all to do with this ſmall parcel of land; ſo the general property, which a civil ſociety, or a number of individuals united into one body and acting together, acquires by occupancy in the tract of land, where it ſettles, is a right of ſuch collective body to exclude the reſt of mankind, all other civil ſocieties, and all other individuals, who are not members of this body, from having any thing

[b] See B. I. C. III. § XIII. XIV.

at

at all to do with this large parcel of land. This exclusive right of general property in a civil society, as it is distinguished from the private right of the same sort, which the several members have in their separate shares or estates, is called the jurisdiction of the society over the land: and that whole tract of land, which is thus under the jurisdiction of the society, or in which the society has such an exclusive right of general property, is called its territory. [1]One immediate and necessary effect of this jurisdiction, as has already been shewn, is, that no alien is capable of having private property in any part of the territory, or rather that no member is capable of transferring such private property to an alien, without the express consent of the society. We have likewise taken notice of an accidental effect of this jurisdiction in respect of aliens, which is, that, since no alien can have any right to come within the territories of the society, if the society chuses to hinder him, it follows, that no alien can take even moveable goods, which are within the territory, though they are no part of it, if the society has forbidden it. In general the jurisdiction of a society over its own territory subjects all the rights, that any person may be supposed to have to any thing, which is either a part of the territory or within it, to be regulated and governed by the society: even the rights of aliens are subjected by it to be thus regulated; notwithstanding such aliens, as to their persons, are neither members of the society, nor have ever put themselves under its protection. In the mean time this is no more inconsistent with the natural liberty of such aliens, than it is inconsistent with the liberty of an individual in a state of nature, if he chuses to accept of a part of

[1] See B.I. C. VI. § VI.

any other individuals private eſtate, to be bound to accept it upon ſuch terms, as the owner of the eſtate ſhall preſcribe, or if he chuſes to * hunt upon the ſoil, or to fiſh in the waters of another, to be bound not to hunt ſuch beaſts, or not to kill ſuch fiſh as the owner forbids him to meddle with. For as the right of the individual, in one caſe, depends upon the will of the owner, ſo the right of the alien, in the other caſe, depends upon the will of the ſociety. The particular property, which the owner has in the land, makes it lawful for him to keep it to himſelf and not to give any part of it to the other; and his particular property in the ſoil or the water makes it lawful for him to hinder the other from uſing them at all. No injury therefore is done to this other, if the land is not given him, or if the uſe of the ſoil and the water is not allowed him upon his own terms, but upon ſuch terms only as the particular owner thinks proper. In like manner the general property, which the ſociety has in its territory, makes it lawful for ſuch ſociety to confine all private property to its own members, without granting an expreſs allowance to any aliens to have any land, which is a part of the territory: and the ſame general property makes it lawful for the ſociety to hinder any alien from coming into the territory to take away ſuch moveable goods as are found within it. No injury therefore is done to ſuch alien, if he is not allowed to acquire private property there, or to take any moveable goods from thence, upon his own terms, but upon ſuch terms only, as the ſociety, which is the general owner, thinks proper. But if the ſociety, upon account of its general property, has a right to hinder thoſe, who are neither members of it

* See B. I. C. V. § V.

nor

nor under its protection as to their perſons, from taking ſuch things, as are either a part of its territory or are within ſuch territory; it neceſſarily follows, where any diſpute ariſes concerning ſuch things, that though ſome or all the parties concerned in the diſpute are otherwiſe not under the protection of the ſociety, ſo as to give the ſociety any immediate juriſdiction over their perſons; yet in conſequence of the juriſdiction, which it has over the thing in diſpute, it will have a right to compel them either to take it according to the ſentence, which the ſociety gives upon the diſpute, or not to take it at all.

We may call this right by the name of civil juriſdiction, if we pleaſe; but it can be called ſo no otherwiſe, than as it belongs to a civil ſociety: for it is a ſort of juriſdiction, which does not ariſe out of civil union. And indeed, though it may belong to a civil ſociety, yet it is not confined to a civil ſociety: it is a right, which is incidental to property either general or particular, and may as well belong to an individual in a ſtate of natural liberty, as to a number of individuals united by ſocial compact into one body. Or ſuppoſe this ſort of juriſdiction to belong only to a body of individuals ſo united into one civil ſociety; it would ſtill be improper to ſay, in reſpect of thoſe, who are not members of this body, that this juriſdiction, as it affects them, ariſes from civil union. Though we ſhould ſuppoſe, what is not true, that civil union is neceſſary, before any ſuch juriſdiction can ſubſiſt; yet it cannot be civil union, which extends this juriſdiction to aliens: becauſe aliens are not in civil union with the ſociety, which has the juriſdiction. But after all, thoſe, who are not under the protection of the civil ſociety, and are therefore clear of its

its direct juriſdiction over their perſons, may, if they pleaſe, avoid any indirect juriſdiction of this ſort, ariſing from its general property, by not endeavouring to obtain ſuch things, as are within its juriſdiction. And ſince their endeavouring to obtain them is their own act, even this juriſdiction over things becomes a juriſdiction over their perſons no otherwiſe, than by their own conſent. We cannot indeed ſay, that both or all of the parties, if they are more than two, who contend about a thing, which is in the juriſdiction of the ſociety, muſt neceſſarily, as to their perſons, be under the protection of ſuch ſociety, or that the ſociety will otherwiſe have no juriſdiction. But ſtill the notion of common protection is ſo neceſſarily connected with the notion of juriſdiction, that the ſociety could have no right to decide the conteſt, and to compel the contending parties to ſubmit to the deciſion; if the rights of all of them, as far as this diſpute is concerned, were not under its protection.

But we have no occaſion to enter any farther into this enquiry concerning the juriſdiction, which a civil ſociety has over its own territory, or over ſuch moveable goods, as are within its territory. The juriſdiction of a civil ſociety, as it reſtrains the right of defence, is a direct juriſdiction over the perſons, and is founded partly in the protection, which he, who is to be defended, has acquired a right to, or rather in his conſent to be reſtrained in his liberty of defence, which conſent he muſt be underſtood to give by the ſame act, which gave him a right to protection; and partly in the protection, which the ſame ſociety owes to them, againſt whom he is to be defended.

IV.

IV. [l] Civil juriſdiction may ceaſe either in fact or of right. It ceaſes in fact, where any perſon has a right to the protection of the ſociety, but the ſociety cannot in fact give him protection. What has been [m] already ſaid concerning ſuch civil juriſdiction, as reſtrains the right of defence, will ſerve to ſhew us, that where he, who is to be defended, is not under the protection of the ſociety, the juriſdiction, which the ſociety has over him, muſt neceſſarily ceaſe. For civil juriſdiction, in reſpect of the right of defence, ſuppoſes this and more than this; it ſuppoſes that both he, who is to be defended, and they likewiſe, who are about to injure him, are under the protection of the ſame civil ſociety. Notwithſtanding therefore he may have a right to be protected by the ſociety, yet if in fact the ſociety cannot protect him; the civil juriſdiction of the ſociety, though it ſubſiſts of right, will ceaſe in fact. How civil juriſdiction ceaſes.

When civil juriſdiction thus ceaſes in fact, it may ceaſe either for the preſent inſtant only, or for ſome indefinite length of time. A perſon, who has a right to be protected by a civil ſociety, cannot in fact receive protection from it; ſometimes becauſe the ſociety cannot interpoſe at the inſtant, when he wants its protection, though it might be able to interpoſe afterwards, when its protection would come too late; and ſometimes becauſe it cannot interpoſe either at the preſent inſtant, or at any determinate time hereafter.

Civil juriſdiction ceaſes of right, where there is no civil juriſdiction at all, that is, where no civil ſociety has any right to interpoſe and reſtrain a man from acting for himſelf by his own force, and at his own diſcretion.

[l] Grot. ibid. [m] See § II.

This

This diviſion, though it is different from our authors as to the form of it, is the ſame with his in ſubſtance. He firſt divides the caſes, where civil juriſdiction ceaſes, into thoſe, where it ceaſes only for the preſent inſtant, and thoſe, where it ceaſes for an indefinite length of time. And then he goes on to divide the caſes, where it ceaſes for an indefinite length of time, into thoſe, where it ceaſes in fact, and thoſe, where it ceaſes of right. But becauſe civil juriſdiction can ceaſe no otherwiſe than either in fact or of right; and becauſe it does not appear in his diviſion, whether it ceaſes in fact or of right, when it ceaſes only for the preſent inſtant, I have therefore choſen, whilſt I kept to the ſubſtance of that diviſion, to change the form of it.

Where civil juriſdiction ceaſes, either in fact or of right, there can be no doubt of a mans having the ſame liberty to defend himſelf by his own force and at his own diſcretion, notwithſtanding he is a member of a civil ſociety, that he would have had, if he and all mankind had ſtill continued in the liberty of nature. For civil juriſdiction, in reſpect of the liberty of private defence, is the right, which a civil ſociety has to reſtrain a man from deciding his own quarrel and to decide it for him: and in all inſtances, where the right of any civil ſociety to reſtrain him from acting for himſelf ceaſes, he muſt neceſſarily be as much at liberty to act for himſelf, as if no ſociety had ever been formed at all.

Right of defence, where civil juriſdiction ceaſes in fact.

V. Civil juriſdiction ceaſes in fact, for the preſent inſtant; when the injury, which threatens us, is ſo immediate, that the public, or the civil magiſtrate for the public, cannot come to our aſſiſtance time enough to prevent or to repel it; that is, when we are in ſuch circumſtances,

ces, that we cannot poſſibly be defended at all, unleſs we defend ourſelves by our own private force.

But yet, if we conſider any perſon as a member of civil ſociety, we ſhall find, that, even in theſe circumſtances, it is not every injury, which will juſtify him in proceeding to extremities. I do not mean, that the injury, with which he is threatened, may be ſo remote or ſo uncertain, as to give him time to apply to the ſociety and to obtain the aſſiſtance of the public to guard him againſt it. There can be no doubt of his being obliged, as a member of civil ſociety, to have recourſe to the ſociety, where the injury is of this ſort: becauſe, in reſpect of ſuch injuries as theſe its juriſdiction ſubſiſts both of right and in fact. He has a right to the protection of the public, and has in fact an opportunity of obtaining protection. But what I mean is, that the injury, though it is both immediate and certain, may be too ſmall in its own nature to juſtify him in taking away the life of the aggreſſor, or in doing him any grievous harm, in order to prevent him from putting his deſign in execution. This is not merely matter of humanity or benevolence; but when he is conſidered as a member of civil ſociety it ſeems to be what the ſociety may claim of him. Leſſer injuries, where men live in a ſtate of ſociety, may commonly be repared, after they are over. The magiſtrate perhaps has not an opportunity of repelling the harm, but he may and commonly will have an opportunity of interpoſing afterwards, to take care, that full amends ſhall be made to the perſon, who has ſuffered it. In reſpect therefore of ſuch leſſer injuries, as may eaſily be repared, civil juriſdiction cannot properly be ſaid to ceaſe; however immediate and however certain they may appear to be. The members

bers of the ſame civil ſociety ſeem to be as effectually protected againſt one another, where they are ſure of being made amends for the injury, that they have ſuffered, as where they are guarded beforehand againſt ſuffering it at all.

The loſs of life indeed, or the loſs of chaſtity, are in their own nature irreparable injuries. If the public cannot interpoſe to guard thoſe, who are under its protection, againſt ſuch injuries as theſe, they are as much at liberty, in a ſtate of ſociety, to defend themſelves by all neceſſary means, as they would have been in a ſtate of natural equality; even though the aggreſſor's death ſhould be the conſequence of their defence: becauſe it is to no purpoſe for the public to interpoſe, after the injury is over; if no amends can be made for the loſs, that has been ſuſtained.

Sometimes injuries of a lower ſort, though they are not irreparable in their own nature, are irreparable by accident. And there is the ſame reaſon, why a man ſhould be at liberty to defend himſelf againſt theſe, as there is, why he ſhould be at liberty to defend himſelf againſt the other; where he can have no aſſiſtance from civil juriſdiction. Of this ſort we may reckon the loſs of goods, where the perſon, who attempts to ſteal them is unknown; or where, though he is known, there is a moral certainty, that the public can never interpoſe, ſo as to obtain the reſtitution of them. The rules, that ought to be obſerved in theſe circumſtances, are the ſame, that ought to be obſerved, in a ſtate of nature. And where the law of nature would juſtify a man, conſidered as an individual, in proceeding to extremities, the ſame law will juſtify him in taking the ſame meaſures, though he is a member of civil ſociety.

When

When civil juriſdiction ceaſes only for the preſent inſtant, the danger muſt be immediate. But both the notion of an [a] immediate danger, and the notion of the preſent inſtant are to be underſtood with ſome latitude. Every danger is an immediate one, as to the purpoſe of allowing the members of any civil ſociety to defend themſelves againſt one another, if ſuch danger is ſo near, that it cannot be avoided by any other means. And the preſent inſtant, as to the ſame purpoſe, is not a ſingle point of time, that has no duration; it is underſtood to continue as long, as the impoſſibility of obtaining the aſſiſtance of the magiſtrate continues. If a man has been threatening to kill you, and is ſeizing a ſword or ſome other weapon, with a plane deſign, as far as you can judge, of putting his threats in execution; the danger is immediate enough to juſtify your defence of yourſelf, at your own diſcretion, without waiting, till the weapon is at your breaſt. Suppoſe, that you and the aggreſſor had cloſed with one another, and had ſtruggled together for ſome time, before you were able to get ſuch an advantage over him, as to make your defence effectual by diſpatching him; though this length of time cannot ſtrictly be called an inſtant, yet your right of private defence continues during the whole of it: becauſe there is in every part of it the ſame impoſſibility of your being aſſiſted by the civil magiſtrate or protected by the public.

[b] Grotius aſks here, whether it would be lawful to ſecure our own life by killing a perſon, who attempts to take it from us by ſuch means, as we are ſure will operate effectually in the end, if we ſuffer him to go on with his deſign, though they do not produce their ef-

[a] Grot. L. II. C. I. § V. [b] ibid.

fect

fect immediately? If, for inſtance, we are certain, that he lies in wait for us himſelf, or has conſpired with others to take the firſt opportunity of deſtroying us by ſuch means, as ſhall offer themſelves, or by ſuch means as they have contrived, by aſſaſſination, by poiſon, by a falſe accuſation, falſe evidence, or an unjuſt ſentence in a tryal for any capital offence; may we lawfully kill him, to prevent ſuch a remote injury, as this? Before a queſtion of this ſort can be properly anſwered, it ought to be ſtated more preciſely, than it is ſtated here, by diſtinguiſhing between the caſe of perſons, who live in a ſtate of nature, and of perſons, who are under the protection of the ſame civil ſociety.

Grotius, by mentioning falſe accuſations, falſe evidence, and an unjuſt ſentence, ſeems to ſuppoſe the parties, concerned in the queſtion, to be members of the ſame civil ſociety: becauſe in other circumſtances, the notion of accuſations, evidence, and a judicial ſentence are unintelligible. And certainly, if they are in a ſtate of civil ſociety, the perſon, who apprehends ſuch a remote injury, though he is ever ſo well aſſured, that it will come upon him, unleſs he takes care to guard againſt it, has no right to defend himſelf by his own force, and at his own diſcretion. The reaſon, why he has no ſuch right, has been given already: he has time enough before him to apply to the public for protection; and where he has time enough for this purpoſe, that is, where civil juriſdiction does not ceaſe, he is bound, as he is a member of civil ſociety, to make uſe of the protection of the public for his ſecurity againſt all, who belong to the ſame ſociety with himſelf.

But if we attend to the point, which our author had before him in this place, we ſhall find reaſon to think, that

that he deſigned to extend the queſtion farther than this, and to enquire, not ſo much whether mankind have ſuch a right of private defence in civil ſociety, as whether they have it at all, either in a ſtate of ſociety or in a ſtate of nature. He is here explaning what ſort of injuries, before they are committed, are in his opinion juſtifiable cauſes of war in general, not only of public war, which is the war of ſocieties, but of private war likewiſe, which is the war of individuals. And ſince private war may begin, not only amongſt individuals, who are in a ſtate of ſociety, when civil juriſdiction happens to ceaſe in fact; but amongſt individuals, who never were in a ſtate of civil ſociety, or under any civil juriſdiction; this queſtion, whether the uſe of force is lawful to prevent a remote injury, if we extend the ſenſe of the words as far as the point, that Grotius had before him, requires, muſt mean not only, whether ſuch uſe of force is lawful amongſt the members of the ſame ſociety, when civil juriſdiction ceaſes, but whether it is lawful at all, even amongſt individuals, that are under no civil juriſdiction, or are not members of any civil ſociety. We have juſt now aſſigned the reaſon, why ſuch perſons, as are under the protection of the ſame civil ſociety, are not at liberty to defend themſelves by their own force againſt ſuch remote injuries; not becauſe they have no ſuch liberty, where civil juriſdiction ceaſes, but becauſe in reſpect of remote injuries, which in their own nature allow of time for an application to the magiſtrate, civil juriſdiction does not ceaſe in fact. But [p] when we were explaning the right, that individuals in a ſtate of nature have to defend themſelves againſt injuries, before they

[p] See B. I. C. XVI. § V.

are committed, we ſhewed in what manner this right may extend to ſuch injuries as are at a diſtance.

[q] Where one part of a ſociety is in a ſtate of civil war againſt the other, or where the ſubjects are in a ſtate of rebellion againſt their governours; individuals of the oppoſite parties, whatever they may be of right, are not in fact under the protection of the ſame ſociety. Civil juriſdiction therefore, in reſpect of ſuch individuals, as are of oppoſite parties, ceaſes in fact, not merely for an inſtant, but for an indefinite length of time; it ceaſes as long as the ſtate of civil war or of rebellion continues; and in the mean while ſuch individuals have the ſame right of private defence, that they had in the liberty of nature.

It is a more material queſtion, whether the natural right of private defence returns, where the civil magiſtrate refuſes to take notice of the danger, that a man imagines himſelf to be in, and to obtain ſecurity for him againſt ſuffering the injury, that others, as he apprehends, are preparing to do him. When [r] Grotius mentions this as one inſtance, in which civil juriſdiction ceaſes in fact; he muſt certainly ſuppoſe, that the man has met with this refuſal not only from one civil magiſtrate, but from all, that have any authority to interpoſe in his favour: for in moſt civil ſocieties there is a ſubordination of magiſtrates, and if thoſe of an inferiour ſort refuſe to relieve the perſon aggrieved, he may apply to thoſe of a ſuperiour ſort, who have authority either to grant him relief themſelves, or to compel the others to grant it. And there is planely no ground for maintaining, that civil juriſdiction ceaſes, upon account of his having met with a refuſal from ſome of the ma-

[q] Grot. L. I. C. III. § II. [r] Grot. ibid.

giſtrates;

giſtrates; when there are others within the ſociety, who might either defend him or take care, that he ſhould be defended, if he had made his application to them. But ſuppoſe him to have met with a refuſal from all, that he can apply to; ſuch a refuſal, as this, ſeems rather to be an act, than a failure of civil juriſdiction. Some injuries are ſo ſlight, that it is of no importance for him to obtain ſecurity againſt them. Suſpicions of a future injury may be ſo uncertain, as to afford no ground for the ſociety to interpoſe; or they may be ſo falſe, as to make it unjuſt to regard them; or they may be ſo malicious as to deſerve cenſure, rather than redreſs. There may be theſe and many other reaſons of the like ſort, why his application to the public ſhould be diſmiſſed. When therefore the ſociety, or the magiſtrate for the ſociety, does diſmiſs it; this is to be conſidered as a determination of the ſociety, that its interpoſition would be either unneceſſary or improper. In this view of the matter, he can have no right of private defence, in conſequence of ſuch a refuſal; unleſs we would ſuppoſe, what is confeſſedly falſe, that every man, after he is a member of civil ſociety, has the ſame right to judge, whether the ſociety has done him juſtice, that he has in a ſtate of nature to judge, whether an individual has done him juſtice.

Right of defence where civil juriſdiction ceaſes of right.

VI. Civil juriſdiction, ſays our [a]author, ceaſes of right between perſons, who happen to be out at ſea, or in an uninhabited iſland, or in any other place where no civil ſociety is eſtabliſhed. His opinion is, that perſons in theſe circumſtances have the full liberty of private defence: for as there is, by the ſuppoſition, no civil juriſdiction, as they are not under the protection

[a] Grot. ibid.

of the ſame or indeed of any civil ſociety; there is nothing to reſtrain this liberty.

This opinion muſt however be underſtood with ſome reſtrictions: and we ſhall ſee more planely what the neceſſary reſtrictions are, if we conſider the perſon, who is in danger of ſuffering the injury, and the others, who are about to do it, either as members of no civil ſociety, or of the ſame civil ſociety, or of different civil ſocieties.

If he, who is in danger of being injured, and the aggreſſor are not members of any civil ſociety, the caſe does not come within the preſent queſtion. He has indeed a right of private defence; but the ground of this right is, not that civil juriſdiction ceaſes between them, but that they are ſtill in a ſtate of nature.

He and the aggreſſor may, when they are at home, be members of the ſame civil ſociety; and if they are, civil juriſdiction will ceaſe between them in fact only, and not of right, when they are abroad. The juriſdiction, which a civil ſociety has over the perſons of its members, affects them immediately, whether they are within its territories or not. Both the parties therefore, though they are out of the territories, are under the juriſdiction. As long as their claim to protection ſubſiſts, the juriſdiction of the ſociety will ſubſiſt of right. And ſince, by the ſuppoſition of their being members of the ſame ſociety, both of them have a right to its protection; civil juriſdiction can have ceaſed no otherwiſe between them, than as their accidental ſituation may have rendered it impoſſible for the perſon, who is in danger of ſuffering the injury, to apply for protection againſt the aggreſſor to the civil magiſtrate.

But if they are members of different civil ſocieties,

they

they are not of right under the protection of the ſame civil ſociety; there is therefore no civil juriſdiction, that can of right reſtrain the liberty of defence: the law of nature is the only reſtraint upon it; and he, who apprehends himſelf to be in danger of ſuffering an injury, ſeems to be the only judge, how far this law will juſtify him, in making uſe of his own force to prevent or repel it.

The only ground for ſuppoſing the ſociety, of which the perſon, who defends himſelf, is a member, to have a right of reſtraining him, as to the occaſion and manner of his defence, is, that they, againſt whom he defends himſelf, may under this pretence be injured by him; and they have a claim, as individuals in a ſtate of nature, that this ſociety ſhould not make itſelf an acceſſory to the injury. [t] Amongſt other ways, by which the ſociety may be an acceſſory to what he does, one is by protecting him againſt them, after the injury is over. And ſince he, by the ſuppoſition, as a member of the ſociety, has a claim to its protection; it does not appear at firſt ſight how the ſociety can conſiſtently with his claim avoid being an acceſſory. The ſociety may by this means be brought into great inconveniences, eſpecially if they, who are thus injured, are members of another ſociety, which will interpoſe in their quarrel, and call it to an account for what one of its members has done. The general good therefore ſeems to make it neceſſary, that every member of a ſociety, merely as he is under its protection, ſhould be ſubject likewiſe of right to its juriſdiction; without conſidering, whether thoſe, againſt whom he defends himſelf, are under its protection or not; that ſo the ſociety, as it might be led into inconveni-

[t] See B. I. C. XVII. § VI.

ences by his claim of protection, may have a right to reſtrain him from acting at diſcretion even againſt aliens. But this concluſion proceeds upon a miſtaken notion of a mans claim to be protected by the ſociety, to which he belongs. He has only a claim to be protected in the enjoyment of his rights, and not a claim to he protected in whatever he does, whether it is right or wrong. The ſociety therefore is not obliged to make itſelf an acceſſory, if under the pretence of defending himſelf, he has done them an injury: it is at liberty, as ſoon this appears, to deliver him up to thoſe, who have been injured by him; if he is not willing to make proper ſatisfaction.

Where civil juriſdiction ceaſes of right, we have ſuppoſed the perſons concerned to be out at ſea, or in an uninhabited iſland, or in ſome place where no civil ſociety is eſtabliſhed: becauſe if they are within the territories of any ſociety, whether either of them are properly members of it or not, they have a temporary civil union with it and are under its protection. The ſociety would not allow them to ſtay within its territories, or even to come thither, unleſs they agreed to conform to its laws, whilſt they are there. They therefore by ſtaying there, or by coming thither, are underſtood to conſent to theſe terms, and by ſo conſenting they make themſelves temporary ſubjects. The ſociety in the mean time, by ſuffering them to be there, is underſtood to accept them in this character, and conſequently to give them a temporary right to its protection.

The general conſequence, which follows from hence is, that after mankind are united into civil ſocieties, the law of nature forbids private war in any inſtance, and

[a] See B.I. CXVII. § VI.

particularly

particularly duelling, which is one inſtance of private war, even in ones own defence; except where an injury, which cannot be repared, after it is over, is ſo near, that we cannot apply to the civil magiſtrate for the interpoſition of the ſociety, which has both us and the aggreſſor under its protection; or where the aggreſſor is in a ſtate of rebellion or of civil war againſt that part of the ſociety, which has us under its protection; or laſtly, where we and the aggreſſor are not within the territories of any civil ſociety whatſoever. I call the obligation, which reſtrains us, an obligation of the law of nature; notwithſtanding it ariſes from civil union. For civil union is an act of conſent; and whatever obligation ariſes from our own conſent is an obligation of the law of nature; whether that conſent is ſuch as may leave us ſtill in a ſtate of nature, or ſuch as joyns us to a civil ſociety, or at leaſt places us for a time under its protection.

Right to reparation how ſubjected to civil juriſdiction.

VII. In a ſtate of equality, after an injury is committed, they, who have ſuffered any damage by it, are at liberty to make themſelves amends, at their own diſcretion and by their own force: they are at liberty to take ſo much of the offenders goods, as is equal in value to what they have loſt; and the law of nature will give them property in the goods ſo taken. But in a ſtate of civil ſociety, if both the offender and the ſufferers are under the protection of the ſame ſociety, their right of obtaining reparation is reſtrained, and becomes ſubject to civil juriſdiction. The ſufferers by having placed themſelves under the protection of the ſame ſociety, which is engaged to protect the offender, have conſented, that as this ſociety is to guard them againſt any cauſeleſs harm, which he might do them, ſo it

ſhall guard him likewiſe againſt any cauſeleſs harm, which they might do him. And from this conſent of theirs it acquires a right, to ſtop them from acting for themſelves, as they pleaſe; wherever ſuch a liberty might be hurtful to him. Theſe, as we have ſeen already, are the principles, from whence civil juriſdiction is derived, in reſpect of the right of private defence: and theſe are likewiſe the principles, from whence it is derived, in reſpect of the right, which individuals have in a ſtate of equality, to obtain reparation for themſelves. We may poſſibly pretend, that we have ſuffered ſome damage, when we have ſuffered none; or though ſome damage has been done, we may rate it too high; or though the offender is willing to make us amends, we may cauſeleſsly uſe force for obtaining it; or when he is unwilling we may uſe more force, and may do him more harm, than is neceſſary. But ſince the ſociety has, in conſequence of our conſent, a right to take care, that we do him no injury, under the notion of reparing our own damage; it has not only a right to reſtrain us from acting againſt him at all, upon this pretence, till it is ſatisfyed, both that reparation is due to us, and what that reparation is; but a right likewiſe to reſtrain us, after this point is ſettled, from uſing any force, but ſuch, as is under the conduct of the common underſtanding.

In the mean time, though a member of civil ſociety is reſtrained in his right to obtain reparation, this right is not deſtroyed. He does not entirely loſe his right to obtain reparation, he only loſes his right to obtain it at his own diſcretion and by his own force: he is not obliged to ſubmit to damage without redreſs; but is obliged, if he ſeeks redreſs, to ſeek it by the uſe of the public force, which is under the direction of the common under-

understanding. He has still the right to obtain reparation, and the society, when it interposes, either by itself or by the civil magistrate to obtain reparation for him, interposes in his right, and not in its own.

Civil jurisdiction in respect of reparation cannot cease in fact, for the present instant only.

VIII. Though civil jurisdiction in respect of the right of private defence may cease in fact, for the present instant only; yet in respect of the right of obtaining reparation by private force it cannot cease in this manner: if it ceases, so as to leave any person at liberty to act for himself, it must either cease in fact for some indefinite length of time, or else it must cease of right. Where an injury is coming upon a man, it is possible, that he may have no time to apply to the society for protection, but may be under the necessity either of defending himself or of not being defended at all. But after an injury is past, he cannot well be driven to these straights in regard to the obtaining of reparation for the damages, that have been done by it. He can scarce want time to apply to the society for this purpose: because, though defence might be useless, if it did not come at the present instant, yet reparation may be obtained at one time as well as at another. When the injury is over, he has leisure enough to seek redress; and the assistance of the society for obtaining reparation will be as effectual at some future time, as it would be now.

[v] Grotius mentions one case, which is in part an exception to these principles. He supposes the offender to be removing out of the territories of that society, which is to protect the sufferers, and to be carrying his goods along with him. In these circumstances, if they do not stop either him or his goods, it will hereafter be impossible for the society to do him justice.

[v] L. II. C. VII. § II.

Civil

Civil juriſdiction therefore will ſo far ceaſe in fact for the preſent inſtant only, as to leave them at liberty to ſtop either his perſon, or his goods, or both. But this does not come up to the right, which they had in a ſtate of natural equality, of obtaining reparation by their own force and at their own diſcretion. The law of nature, in ſuch a ſtate of equality, would not only have allowed them to ſeize upon an equivalent out of his goods, but would have given them property in ſuch equivalent. Whereas in a ſtate of civil ſociety, the ſame law, in conſequence of their own conſent, will not allow them to act for themſelves, when they can have recourſe to the civil magiſtrate. Since therefore, after they are in poſſeſſion of the goods, they will have leiſure enough for this purpoſe; however they may be at liberty to ſeize upon the goods, they are not at liberty to uſe them as their own; till they are adjudged to be their own by the civil magiſtrate: civil juriſdiction may ſo far ceaſe, as to give them a right to take poſſeſſion; but it will not ſo far ceaſe as to give them a right to keep poſſeſſion: they may ſeize upon the equivalent; but it is the civil magiſtrate that muſt give them property in it.

Civil juriſdiction, according to the opinion of [w] Grotius, ceaſes in fact for ſome continuance of time, when we are ſatisfyed in our own mind of our right to reparation, but are morally certain, that we cannot recover reparation by the ſentence of the magiſtrate; becauſe we are not able to prove the injury or the damage in ſuch a manner, as the laws of the ſociety require. But the contrary opinion ſeems to be the more probable. A right, which does not appear to the ſociety, is in reſpect

[w] Ibid.

of

of the ſociety no better, than a right, which does not exiſt. All the harm, that we do to thoſe, who are under its protection, in ſupport of ſuch a right, muſt in the judgment of the ſociety be ſo much cauſeleſs harm. They therefore by their civil union have a right to be protected againſt this harm; and conſequently we by our civil union with the ſame ſociety have given up our right to do it.

What has been ſaid already concerning private defence, may eaſily be applyed to reparation for damages, where civil juriſdiction ceaſes of right.

Right of puniſhing how reſtrained by civil juriſdiction.

IX. If we aſk how the right of puniſhing, which every individual had in a ſtate of nature, comes to be reſtrained in a ſtate of civil ſociety; the uſual anſwer is, that the ſeveral individuals have transferred this right from themſelves to the civil magiſtrate. But this anſwer does not take the matter up high enough. The civil magiſtrate in a civil ſociety is the executive body, which is appointed to act for the collective body of it under the reſtraints of the law. And if the civil magiſtrate is appointed to act for the ſociety, we muſt neceſſarily conceive the ſociety to be in exiſtence, before the appointment of ſuch magiſtrate. The firſt ſocial compact unites a number of independent individuals into one body by binding them to act together for certain purpoſes. In ſuch a perfect democracy, as would ariſe from this compact, all the members are equal to one another: there is no particular executive body, conſiſting of one ſingle perſon or of a ſelect number of perſons, which has any authority to act for the reſt. The queſtion therefore is, how the right of puniſhing, which individuals had in a ſtate of nature, comes to be reſtrained in ſuch a ſociety as this? And in this view, it will evidently

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be an unſatisfactory anſwer to ſay, that the ſeveral individuals have transferred their right of puniſhing to the civil magiſtrate; becauſe there is no ſuch thing as a civil magiſtrate, to whom they could transfer it. If we think to corrrect this anſwer by ſaying, that they transfer their right of puniſhment from themſelves to the ſociety; ſuch a correction will only ſerve to make it unintelligible. [x] Each individual, who is a member of the ſociety, would, in a ſtate of nature, have had an equal right of puniſhing with the reſt: for this right is not confined to that individual in particular, who has been injured by the crime, but extends alike to all mankind. The ſociety therefore being nothing elſe but an aggregate body of individuals, who have each of them a natural right of puniſhing; a transfer of this right from themſelves to the ſociety is nothing elſe but a transfer of it from themſelves to themſelves.

The reſtraint upon the right of individuals, to puniſh a criminal ſeparately, is produced by civil union, in the ſame manner with the reſtraint upon the rights of private defence, and of obtaining reparation by private force. If any perſon, who is under the protection of a civil ſociety, is charged with having committed a crime, the ſociety is obliged to take care that he is not injured under the notion of puniſhing him. An individual, who undertakes to inflict the puniſhment by his own private force and at his own private diſcretion, may poſſibly pretend, that a crime has been committed, when nothing at all, or at leaſt nothing criminal, has been done; or he may rate the guilt of a crime too high; or he may inflict a greater penalty, than the guilt deſerves. Upon any of theſe ſuppoſi-

[x] See B. I. C. XVIII. § VIII.

tions,

tions, the perſon, who is charged with a crime, and who perhaps has actually been guilty of one, would be injured by the puniſhment, that is inflicted. The ſociety therefore, which has engaged by the ſocial compact to protect him, is obliged to ſtop the puniſher from proceeding, and to take the matter into its own hands. If the puniſher is not under the protection of the ſame ſociety with the offender; this ſociety acts, in reſpect of the puniſher, no otherwiſe, than any individual might have done in the liberty of nature: any individual, who thought, that the offender was likely to be injured, was at liberty to interpoſe and to protect him againſt the injury. In reſpect of the puniſher, all the difference between a ſociety, with which he has no connection, interpoſing in behalf of the offender, and an individual in the liberty of nature interpoſing for the ſame purpoſe, is, that the ſociety is ſtronger than an individual, and will therefore be better able to take care, that no injury ſhall be done. In reſpect of the offender indeed, there is a farther difference; for in the liberty of nature, he had no claim to be protected from injuries by any individual; but civil union gives him ſuch a claim upon the ſociety, which has taken him under its protection. But if this interpoſition of the ſociety depends in reſpect of the puniſher, upon the ſame principles with the interpoſition of an individual in a ſtate of nature; the reſtraint, that ariſes from hence, upon his liberty of puniſhing ſeparately, is a reſtraint rather in fact than of right: he is ſtill at liberty to puniſh the offenders, if he could, and only gives up this liberty, becauſe he cannot help it. But ſuppoſe the puniſher to be under the protection of the ſame ſociety with the offender;

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the reſtraint in fact upon his liberty of puniſhing ſeparately, will then become a reſtraint upon it of right. By placing himſelf under the protection of this ſociety, ſo as to acquire a claim to its protection, he muſt neceſſarily be underſtood to have given his conſent, that the offender ſhould be protected by it, as well as he: becauſe the ſociety, ſtanding engaged to protect the offender, could not receive him under its protection upon any other terms. Now the protection of the offender conſiſts in the interpoſition of the ſociety to ſtop the puniſher from acting ſeparately, and to take the matter into its own hands: and ſince the puniſher by his civil union with the ſociety has conſented to this; he has by ſuch conſent given up his liberty or his right of puniſhing ſeparately. What has been ſaid of any one individual, whom we have here called the puniſher, may be applyed to every other individual, who is connected with the ſociety by civil union. And thus, notwithſtanding each of them, in a ſtate of natural liberty, had a right of puniſhing a criminal ſeparately by their own private force and at their own diſcretion; they ceaſe by their own conſent to have ſuch a right, when they are united into a civil ſociety, in reſpect of any criminal, who is a member of their body, or is under the protection of the ſame ſociety with themſelves.

From this account of the effect, which is produced by civil union upon the right of puniſhing, it appears, that there is no occaſion to enquire, how the ſociety acquires this right, when the individuals loſe it. For in fact the right of puniſhing, which individuals had in a ſtate of nature, is not loſt, but reſtrained, by civil union. In the liberty of nature each had a right of puniſh-

puniſhing ſeparately: civil union only reſtrains them from puniſhing ſeparately: and conſequently they have ſtill the ſame right of puniſhing, after they are thus united, that they had before; except only, that they have agreed, if they exerciſe it at all, to exerciſe it together. And thus the right, which the ſociety, conſiſting of a member of individuals, has to puniſh, appears at laſt to be nothing elſe but the joynt right of all the individuals.

Difference between juriſdiction in matters of damage and of puniſhment.

X. Both the right of obtaining reparation and the right of inflicting puniſhment ariſe out of an injury, and are brought in the ſame manner under civil juriſdiction. But there is one material difference between theſe two rights in a ſtate of nature, which makes a difference in a ſtate of ſociety between the juriſdiction of the ſociety in matters of reparation, and its juriſdiction in matters of puniſhment.

When an injury has been committed in the liberty of nature, the only perſon, who has a right to reparation, and to make uſe of force for obtaining it, is the perſon, who has ſuffered damage by the injury. [y] Others, who chuſe to give him their aſſiſtance, are then only at liberty to give it, if he aſks for it, or if they ſee that he wants it. As on the one hand he cannot compel them to aſſiſt him, ſo on the other hand, if he waives his right either expreſsly or tacitly, either by declaring openly, that he does not require any reparation, or by ſetting ſtill and not endeavouring to obtain any, they have no right to take the quarrel upon themſelves of their own accord and to enforce reparation for him. The reparation was due only to him: if therefore he gives it up, it is due to no body elſe;

[y] See B. I. C. XIX. § III.

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ſo that the offender ſtands clear of all demands; and whatever they may take from him, under the notion of obtaining reparation for the ſufferer, it will be taken from him unjuſtly. The conſequence of this, in civil ſocieties, is what we have juſt now hinted at: though he is reſtrained by civil union from obtaining reparation by his own force, and at his own diſcretion, yet the right to obtain it is ſtill his: he is obliged indeed, if he ſeeks it at all, to ſeek it by the public force under the direction of the common underſtanding: but the ſociety interpoſes with this force in his right, and not in its own.

When a crime has been committed in the liberty of nature, the right of puniſhing the criminal is not confined to the perſon, who has been hurt by the crime: every individual has the ſame right, that he has, to correct or reſtrain ſuch a bad diſpoſition, as may be hurtful to any of them hereafter, if it is not corrected or reſtrained; that is, every individual has the ſame right, that he has, to puniſh the criminal. The conſequence of this is, that though in a ſtate of civil ſociety, each individual, who is a member of ſuch ſociety, is reſtrained by civil union from puniſhing a criminal ſeparately by his own force, and at his own diſcretion, yet each and all of them have ſtill the right of puniſhing joyntly, by the public force and under the conduct of the common underſtanding. The ſociety therefore, when it inflicts puniſhment, inflicts it in the right of all the individuals, that compoſe ſuch ſociety: or ſince the ſociety is nothing elſe but the aggregate body of all theſe individuals, we may ſay, that the ſociety inflicts puniſhment in its own right, or as it is more uſually expreſſed, in the right of the public.

From

From hence it appears, why the ſame injury, when it is conſidered as doing damage, ſhould be called a private offence, and when it is conſidered as a crime, ſhould be called a public offence. It is called a private or a public offence in reference to the perſon, who is offended by it, and has a right to take notice of it. When therefore it is conſidered as doing damage, it is called a private offence; becauſe the reparation is due to ſome one or more private perſons. But when it is conſidered as an evidence of a hurtful diſpoſition, it is a public offence; becauſe it gives the ſociety, which is a public perſon, a right to puniſh the offender.

I have here called the juriſdiction, which a civil ſociety has both in matters of private and of public wrong, by the general name of civil juriſdiction. [x] Though it is, I believe, more uſual, to call only its juriſdiction in matters of private wrong civil juriſdiction; and its juriſdiction in matters of public wrong criminal juriſdiction.

From hence likewiſe it appears, that after a man has been proved to have done any damage, and the public is ſatisfyed both of the fact and of the reparation, which is due for it; there is no right in the ſociety to remit ſuch reparation: becauſe it is due to the individual, who has ſuffered the damage, and not to the ſociety. But after it has been proved in like manner, that a man has committed a crime, the ſociety has a right to pardon him or to remit the puniſhment: becauſe the puniſhment is not due to any individual in particular, but to all of them equally, that is, to the ſociety itſelf.

XI. Now we have ſeen, how the right of individuals to puniſh ſeparately is reſtrained in a ſtate of civil ſociety, Right to puniſh how veſted in the civil magiſtrate.

[x] See p. 53.

ciety, and by what means the right of puniſhing is veſted in the collective body of the ſociety; it will be no difficult matter to underſtand, how it comes into the hands of the civil magiſtrate. By the civil magiſtrate is here meant the ſupreme executive body of the ſociety; whether it conſiſts of one or of more perſons, acting under the checks and controls of the legiſlative. Indeed we commonly take into our notion of the civil magiſtrate not only the ſupreme executive body, but likewiſe all other perſons, who have any juriſdiction. However, as inferiour magiſtrates have only a juriſdiction derived from the ſupreme executive body, it is not neceſſary to enlarge the definition of the civil magiſtrate in order to include them in it. As the firſt ſocial compact reſtrains the ſeveral members of a civil ſociety from puniſhing a criminal ſeparately, and veſts the right of puniſhing in the ſociety itſelf, that is, in all the members acting joyntly; ſo when it is farther agreed to eſtabliſh any particular executive body, or civil magiſtrate, the right of puniſhing, which was before veſted in the whole ſociety collectively, is veſted by this agreement in ſuch executive body. A transfer here may be ſo explaned as to be intelligible enough. For though the ſeveral individuals could not in the firſt act of civil union be underſtood in any ſenſe to transfer their natural right, of puniſhing ſeparately, to the civil magiſtrate, becauſe the firſt act of civil union does not eſtabliſh any civil magiſtrate; yet the ſociety, after it is formed, or all the individuals, after they are united into one collective body by the firſt ſocial compact, may, if we like the expreſſion, be ſaid to transfer the ſocial right of puniſhing collectively to the executive body: only we ſhould obſerve, that this transfer conſiſts in nothing elſe, but in the ſocietys having made a

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ſtanding appointment of an executive body to act for it with the common force in matters of puniſhment. In like manner, though the ſeveral individuals could not be underſtood in any ſenſe to transfer the right of puniſhing from themſelves to the ſociety; becauſe this would only be a transfer of it from themſelves to themſelves; yet we may ſay, that the ſociety transfers the right, which it has to puniſh collectively, to the civil magiſtrate, that is, to ſome part of the collective body: if we think, that a ſtanding appointment of this ſort to act for the whole can properly be called a transfer.

But it is to be obſerved, that an executive body, whether it conſiſts of one perſon or of more, has not the full liberty or right of puniſhing, which the collective body had, unleſs the legiſlative power is delegated to it, as well as the executive power. All puniſhment in a ſtate of civil ſociety is to be inflicted by the common force under the direction of the common underſtanding. If the ſociety therefore puniſhes in its collective body, it acts under no external reſtraints, but may puniſh or pardon according to its own diſcretion, by which I mean its own judgment of right and wrong; becauſe the common underſtanding, as well as the common force, is in the keeping of the collective body. In like manner, if the ſame perſon, or the ſame ſelect body of perſons, to whom the executive power is committed, ſhould be entruſted likewiſe with the legiſlative power; ſuch an eſtabliſhment would give this perſon, or this body of ſelect perſons, as abſolute a power in matters of puniſhment, as the law of nature and the purpoſes of civil power can allow of. [z] But if the executive body

[z] See B. II. C. IV. §

has only the executive power, which is all that the name of ſuch body imports; it is under the reſtraints of the law, and can only puniſh under the directions of the legiſlative body: becauſe the common underſtanding of the ſociety ſpeaks by its legiſlative body; whether that legiſlative is the whole collective body of the ſociety, or ſome ſelect part of it, to which the legiſlative power is committed. Nay, if the executive body has nothing elſe entruſted to it, by the conſtitution, beſides executive power; as it could not puniſh, ſo neither could it pardon at diſcretion: for the executive power in itſelf is not a diſcretionary power in any reſpect, but is either to act or not to act, as the common underſtanding ſpeaking by the laws directs it. When therefore the conſtitution of government allows the civil magiſtrate or executive body to have a diſcretionary power of pardoning; this is conſidered as ſomething diſtinct from mere executive power, and is called prerogative.

But though the executive body acts under the reſtraints of the law; yet it is appointed, in matters of puniſhment, to act with the common force, inſtead of the ſociety. In conſequence of civil union all the individuals act joyntly, that is, the ſociety acts with its public force, in matters of puniſhment, for the common ſecurity of all its members. But in conſequence of the eſtabliſhment of an executive body, this body acts with the public force for the ſame purpoſe. All crimes therefore, where ſuch a body is eſtabliſhed, may be conſidered as offences againſt the executive body in particular: becauſe they are inconſiſtent with the common ſecurity, which this body is to guard and maintain with the public force of the ſociety.

XII.

XII. [a] Grotius ſeems to be of opinion, that civil juriſdiction cannot ceaſe in fact, for the preſent inſtant, in matters of puniſhment. Mankind in a ſtate of ſociety are at liberty to defend themſelves by their own private force againſt an injury, which is ſo near at hand, as not to allow them time for applying to the civil magiſtrate to defend them. But though defence at the preſent inſtant may be neceſſary; there is not the ſame immediate neceſſity for puniſhing a criminal: puniſhment will anſwer the ends, that are propoſed by it, as well if it is inflicted ſome time hence, as if it was to be inflicted juſt now. There ſeems therefore in matters of puniſhment to be always leiſure enough for applying to the civil magiſtrate. It may be ſaid in reply, that, if the criminal is making his eſcape, there may poſſibly be no opportunity at all of puniſhing him, unleſs the preſent opportunity is made uſe of. When we have been robbed of our money or our goods, and the criminal is going away, ſo that we are in no danger of ſuffering any other harm at preſent, than what he has done already; if any thing can juſtify us in killing him with an arrow or a piſtol, it muſt be either the purpoſe of obtaining reparation for what we have loſt, or the purpoſe of puniſhing him, to prevent his doing the like miſchief hereafter either to ourſelves or to others. The mere taking away his life cannot come within the notion of reparation any otherwiſe, than as we may ſuppoſe it to be the only poſſible means of getting our money or our goods again, when he is going away with them. And it is moſt probable, if we were aſked, why we killed him, that, inſtead of taking notice of the reparation due to us for the damage, which he had done, we

How far civil juriſdiction may ceaſe in reſpect of the right to puniſh.

[a] L. II. C. XX. § VIII. IX.

ſhould ſay, that we did it in order to take a dangerous man out of the way, and to prevent his doing any farther miſchief. If this is the anſwer, which the common ſenſe of mankind would ſuggeſt to them upon this occaſion; it is plane, that in the judgment of mankind, the death of the criminal in theſe circumſtances is intended as a puniſhment: for the notion of puniſhment conſiſts in making a perſon, who has ſhewn a hurtful diſpoſition by ſome harm already done, ſuffer ſuch evil, as will prevent his doing the like again.

But ſuppoſing it to be true, that, where civil juriſdiction thus ceaſes, the members of a civil ſociety would be at liberty to puniſh one another ſeparately; if they were under no other reſtraint, but what ariſes from civil union, yet they may be ſtill farther reſtrained by civil laws. And ſuch laws would be reaſonable upon account of the likelihood, that this liberty might be abuſed: they might pretend, that they puniſhed the criminal by their own private force, becauſe they found it impoſſible to call in the civil magiſtrate, when perhaps no crime was committed, which deſerved puniſhment, or at leaſt, when they might have had the aſſiſtance of the civil magiſtrate, if they had choſen it.

We may obſerve by the way, that no perſon can inflict any puniſhment leſs than death by his own ſeparate right, under the notion of a failure of civil juriſdiction in fact for the preſent inſtant. For if the puniſher had the criminal ſo much in his power, as to be able to chuſe what ſort of puniſhment he would inflict; he certainly had an opportunity of applying to the civil magiſtrate, and conſequently civil juriſdiction did not ceaſe. But whoever ventures to puniſh a criminal with death, upon a ſuppoſition, that civil juriſdiction does ceaſe; ought to be well aſſured, that the crime deſerve

deſerves death: for if it does not, however the laws of his country might acquit him of murder, he could not acquit himſelf of it in his own conſcience.

Where civil juriſdiction ceaſes in fact for any length of time, as it does when the ſubjects are in a ſtate of rebellion; thoſe, who are in ſuch ſtate, are not under the protection of the public: and though a man may be reſtrained by civil laws from puniſhing them for any crime, which they commit, yet if we look no farther than the obligations ariſing immediately out of civil union, he would be at liberty to puniſh them.

Where civil juriſdiction fails of right, the natural liberty of puniſhing is governed by the ſame rules with the natural liberty of defence or of obtaining reparation for damages. And as theſe rules have been already explaned at large, it is needleſs to repeat them here.

Natural principles applicable to ſocial puniſhment.

XIII. The reader will now perceive of what uſe it is to trace out, as we did in the former book, the natural principles of puniſhment amongſt individuals in a ſtate of equality; [b] to point out the ends, which puniſhment has in view; and the reaſons which juſtify it; to mention the rules, that are to be obſerved in capital puniſhments; to determine the nature of thoſe actions, which are puniſhable; to explane the notion of guilt, and the manner of eſtimating it; to ſettle the proper meaſure of puniſhment; to ſhew upon whom it may, and upon whom it may not, be inflicted; and by what means, when it is inflicted upon the anceſtor, it may affect the heir, notwithſtanding the heir could not juſtly be puniſhed for the crime of the anceſtor. For though, when we were tracing out thoſe principles, we applyed them to mankind, conſidered as individu-

[b] See B. I. C. XVIII.

als in a ſtate of equality; yet the principles themſelves extend farther, and may be applyed to mankind, conſidered as united into civil ſocieties. The right, which a ſociety has to puniſh its members, whether it exerciſes this right by itſelf or by its civil magiſtrate, is nothing elſe but the joynt right of all the individuals, that make up the ſociety. Whatever therefore are the principles, by which the law of nature requires an individual to guide himſelf, when he puniſhes by his own private force, and at his own diſcretion; the common underſtanding of a civil ſociety is to be guidded by the like principles, when it puniſhes either by itſelf, or by its civil magiſtrate.

Actions, not puniſhable by individuals, may be puniſhable by magiſtrates.

XIV. We make a wrong application of the principles, by which the law of nature requires individuals to guide themſelves in matters of puniſhment, when we conclude, that no actions are puniſhable by mankind, after they are united into a civil ſociety, but thoſe only, which are puniſhable by individuals in the liberty of nature. In one ſenſe indeed this rule will hold good. All actions, which are puniſhable by a civil ſociety, or by the civil magiſtrate of ſuch ſociety, muſt be of the ſame ſort with thoſe, which are puniſhable by individuals acting ſeparately and independently; that is, [c] as none but unjuſt actions are to be puniſhed in a ſtate of nature, ſo none but unjuſt actions are to be puniſhed in a ſtate of civil ſociety. But when the rule is thus expreſſed, we cannot infer from it, that the civil magiſtrate has no right to puniſh any other actions, beſides thoſe, which independent individuals have a right to puniſh ſeparately: unleſs it could firſt be ſhewn, that no actions can be unjuſt in a ſtate of

[c] See B. I. C. XVIII. § IX.

ſociety,

ſociety, beſides thoſe, which are unjuſt in a ſtate of nature. All actions, which do harm, and by the harm, which they do, are an evidence of a hurtful and dangerous diſpoſition in the perſon, who commits them, are crimes. The hurtful or dangerous diſpoſition of the criminal is his [d] guilt, and makes it juſt to puniſh him, that is, to inflict ſome evil upon him, which may correct or reſtrain that diſpoſition in order to ſecure mankind againſt his doing the ſame or the like harm for the future. If therefore any actions, which, in a ſtate of nature, would have done no harm to mankind, become hurtful to them in a ſtate of ſociety; ſuch actions, though they do not make it juſt for individuals, acting ſeparately, to puniſh the doer of them, will make it juſt for a ſociety, or for the civil magiſtrate to puniſh him.

Perhaps we may ſee the truth of this reaſoning more clearly in the caſe of reparation, than we do in the caſe of puniſhment. The natural rule of reparation amongſt ſeparate individuals is, that no reparation is due, where no damage has been done. And the rule amongſt the members of a civil ſociety is the ſame. But we cannot conclude from hence, that there is no reparation due, amongſt the members of a civil ſociety, in any inſtance, but where it would have been due amongſt ſeparate individuals. [e] Mankind in a ſtate of civil ſociety acquire many ſtrict or perfect rights, which they had not in a ſtate of nature: ſuch actions therefore may do damage amongſt the members of civil ſociety, as would have done no damage amongſt ſeparate individuals. The natural rule is the ſame in both caſes; but it is different in its application:

[d] ibid. § X. [e] See B. C. XVII. § III.

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in a ſtate of ſociety, as well as in a ſtate of nature, no reparation is due; unleſs ſome damage has been done: but many actions may be attended with an obligation to make reparation in a ſtate of ſociety, which were not attended with ſuch an obligation in a ſtate of nature.

It may be farther ſaid, that ſeparate individuals cannot puniſh any thing beſides natural injuſtice. But if we enquire what is meant by natural injuſtice, we ſhall find, that the words admit of three ſenſes; in the firſt ſenſe this principle is not true; in another ſenſe, the reaſon, why nothing elſe is puniſhable by mankind, when they are conſidered as ſeparate individuals, does not extend to them, when conſidered as members of a civil ſociety, and conſequently this principle, though it is true, will be nothing to the purpoſe; and in a third ſenſe of the ſame words, we may reduce whatever is puniſhable by the civil magiſtrate to the notion of natural injuſtice, though we contend at the ſame time, that the magiſtrate has a right to puniſh many actions, which were not puniſhable, or which even could not exiſt, in a ſtate of nature.

Natural injuſtice, in its moſt proper and ſtrict ſenſe, ſignifies the doing harm to mankind by violating what are ſtrictly and properly called [f] their natural rights, that is, ſuch rights as belong to mankind originally by the gift of nature without the intervention of any human act, their rights, for inſtance, to life, to liberty, to freedom from pain &c. In this ſenſe of the words —*natural injuſtice* — it is not true that nothing elſe is puniſhable by individuals in the liberty of nature. The law of nature forbids the violation of their adventitious rights, as well as of their natural rights,

[f] See B. I. C. II. § VIII.

and

and allows them equally to ſecure the enjoyment of their rights of either ſort by puniſhing any perſon, who by having done harm already, in reſpect either of their ſtrictly natural or of their adventitious rights, has ſhewn, that he is diſpoſed and is likely to do them harm again; if he is not corrected or reſtrained. Unleſs the right of puniſhing, as it ſubſiſts amongſt individuals in a ſtate of natural liberty, extended to the violation of their adventitious rights; it would not be lawful for ſeparate individuals to puniſh theft; becauſe theft is a violation of property, and the right of [g] property is of the adventitious, and not of the ſtrictly natural ſort.

But ſuppoſe we enlarge the meaning of natural injuſtice, and underſtand by it not merely the violation of what are ſtrictly called natural rights, but the violation of any rights, whether original or adventitious, which are ſometimes in a larger ſenſe called natural rights, as belonging to mankind in a ſtate of nature. In this ſenſe it is true, that ſeparate individuals cannot puniſh any thing beſides natural injuſtice. But their right to puniſh even this is founded merely in its being injuſtice, and not in its being preciſely natural injuſtice. And conſequently if any other ſort of injuſtice, beſides what is called natural, was poſſible amongſt individuals in a ſtate of nature, they would have the ſame right to puniſh this other ſort; becauſe this likewiſe, though it was not natural injuſtice, would however be injuſtice. The reaſon therefore, why they can only puniſh natural injuſtice, does not depend upon the nature of the right to puniſh, but upon the particular ſituation and circumſtances of the puniſhers: they

[g] See B. I. C. III. § II. VII.

cannot

cannot puniſh any thing, beſides natural injuſtice; becauſe, in their particular ſituation and circumſtances, no other ſort of injuſtice can exiſt. But if the reaſon, which reſtrains their right of puniſhing to natural injuſtice only, depends upon their ſituation and circumſtances, and not upon the nature of the right itſelf; the principle here laid down, that individuals in a ſtate of natural liberty can puniſh nothing elſe, beſides natural injuſtice, will be little to the purpoſe, when it is alledged as an argument to prove, that the ſame individuals can have no right to puniſh any other ſort of injuſtice, after they are united into a civil ſociety. For in civil ſociety their ſituation and circumſtances are ſo altered, that another ſort of injuſtice, beſides what is here called natural, becomes poſſible. The cauſe therefore, which in a ſtate of nature reſtrained puniſhment to natural injuſtice, is then removed. It was before a reſtraint in fact and not of right; they could not puniſh any injuſtice, beſides natural injuſtice; not becauſe no other act of injuſtice is puniſhable upon the ſame grounds, that natural injuſtice is, but becauſe no other ſort of injuſtice could exiſt. When therefore, by the introduction of civil ſociety, another ſort of injuſtice becomes poſſible; the reſtraint, that there was in fact upon their right of puniſhing before, is taken off; and this other ſort of injuſtice becomes puniſhable upon the ſame principles of the law of nature, which gave them in a ſtate of equality a right to puniſh natural injuſtice. This other ſort of injuſtice may be called ſocial injuſtice, which, as far as it can be diſtinguiſhed from natural, conſiſts in doing harm to mankind by violating any rights, which belong to them in a ſtate of civil ſociety, and are different from the

rights,

rights, which belonged to them in a ſtate of nature. Mankind in a ſtate of nature have a right to puniſh any perſon, who has deſignedly and maliciouſly committed any injuſtice; becauſe the law of nature, when they have ſuffered cauſeleſs harm from him already, and find from thence, that he is diſpoſed to do them future harm, allows them to guard againſt ſuch future harm, by correcting or reſtraining him. This principle of the law of nature extends to ſocial injuſtice, and is not confined to natural injuſtice: becauſe one ſort of injuſtice does harm to mankind, as well as the other; and the law of nature no more forbids them to guard themſelves againſt one ſort of harm, than it forbids them to guard themſelves againſt the other.

Natural injuſtice, in a third ſenſe of the words, may mean the violation of any right, which is under the protection of the law of nature, that is, any right of which the law of nature forbids the violation. In this ſenſe individuals in the liberty of nature have certainly no right to puniſh any thing elſe, beſides natural injuſtice: and we may grant too, that a civil ſociety or a civil magiſtrate has no right to puniſh any thing elſe. But it will be no conſequence, that the ſociety, or the civil magiſtrate for the ſociety, has not a right to puniſh many actions, which were not puniſhable by ſeparate and independent individuals. For the ſocial rights of mankind are, in this ſenſe of the words, as much natural rights, as any that belonged to them originally by the gift of nature, or as any that belonged to them either originally or adventitiouſly in a ſtate of nature. All their ſocial rights are acquired conſiſtently with the law of nature: they are acquired by conſent either

expreſs

expreſs or tacit, either direct or implyed: and [h] all rights, which are ſo acquired, are equally under the protection of the law of nature; becauſe this law equally forbids the violation of any of them.

It is a crime for any man, who is a member of a civil ſociety, to joyn with the enemy in time of war and fight againſt that ſociety. But if we confine the notion of natural injuſtice to the violation of ſuch rights, as belonged to mankind in a ſtate of nature, this, though we call it a crime, cannot be an act of natural injuſtice; for it is ſo far from violating any ſuch right, that in a ſtate of nature, the act itſelf would be impoſſible. No man can fight againſt the ſociety, of which he is a member, when he is not a member of any ſociety at all. The ſocial injuſtice of the act is what makes it criminal: the ſociety, when he became a member of it, acquired, by his own conſent, a right to his aſſiſtance towards ſecuring and advancing the general good: and to joyn with the enemy in fighting againſt it is a violation of this right. In one ſenſe indeed this is an act of natural injuſtice, and in ſuch a ſenſe, as will make it puniſhable upon principles of the law of nature. Though it is not a violation of any right, which belonged to mankind in a ſtate of nature, yet it is a violation of ſuch a right, as was acquired agreeably to the law of nature, and is under the protection of this law. What has here been ſaid concerning one inſtance of treaſon, will be applicable to many other inſtances; the crimes, which are ranked under this head, conſiſt in ſuch acts, as were impoſſible, and therefore could not be puniſhable, in a ſtate of nature. But he would in the mean time be thought to maintain a doctrine very unreaſonable in itſelf, and very deſtructive to his country, who ſhould contend, that treaſon

[h] See B. I. C. II. § VIII.

treaſon is not puniſhable in a ſtate of ſociety, becauſe it is not a violation of any right, which ſubſiſts in a ſtate of nature.

Where a man has wool produced by his own ſheep; he would in a ſtate of nature be at liberty to carry it to any place, that he pleaſed; and to ſell it to any perſons, that he pleaſed. This liberty is not reſtrained merely by the act of ſocial union; he may be a member of a civil ſociety, and yet be at liberty to carry his own wool to a foreign market, and to ſell it there to foreigners. This is no act of natural injuſtice, in one ſenſe of the words; becauſe it is no violation of any right, that belonged to mankind in a ſtate of nature. And it is no act of ſocial injuſtice by any immediate effect of the ſocial compact. When we conſider the owner of the wool, as a member of any civil ſociety, the ſociety has indeed a right, in conſequence of the ſocial compact, to hinder him from diſpoſing of his wool in ſuch a manner, as appears to the common underſtanding to be hurtful to the public. But whether the ſelling of it to foreigners will be hurtful to the public, or not, in the judgment of the common underſtanding, appears only by the laws. He will therefore continue at liberty to ſell it to whom he pleaſes; as long as the laws of his country are ſilent upon this head. But as ſoon as theſe laws have forbidden him to ſell it to foreigners; ſuch ſelling becomes an act of ſocial injuſtice; and the ſociety will upon the principles of the law of nature have a right to puniſh him for it. I ſay upon the principles of the law of nature; becauſe the law of nature leaves all the members of the ſociety acting joyntly, that is, it leaves the ſociety itſelf, or the civil magiſtrate acting in its ſtead, at liberty to puniſh any perſon, who deſignedly does cauſe-

leſs

leſs harm; whether that harm affects mankind in ſuch rights, as were the original gift of nature, or in ſuch, as were acquired in a ſtate of nature, or in ſuch, as were acquired in a ſtate of ſociety agreeably to the law of nature.

Drunkenneſs, lewdneſs, prodigality, and idleneſs do harm only to the vicious themſelves, and no harm to others, when mankind are conſidered as ſeparate and unconnected individuals. [i] They are therefore ſuch crimes, as mankind are not at liberty to puniſh in a ſtate of nature. Theſe vices may, and moſt probably will, lead men to ſome act of natural injuſtice; and when they do, though this act is puniſhable, yet ſtill the vices themſelves, as no natural injuſtice is included in the notion of them, are only the remote occaſion of the puniſhment. But in a ſtate of ſociety it is otherwiſe. As the compact, which unites mankind into a civil ſociety, binds all and each of the members on the one hand to advance the general good, in ſuch a manner as the common underſtanding ſhall preſcribe, ſo it gives the ſociety on the other hand a right to demand this of all and each of the members. When the laws therefore, in view to the general good, have forbidden theſe vices, they become matter of ſocial injuſtice; and the ſociety has a right, upon the principles of the law of nature, to puniſh thoſe, who are guilty of them.

In like manner offences againſt God, though they are [k] not objects of human puniſhment in a ſtate of nature, may be puniſhed by the civil magiſtrate in a ſtate of ſociety. When we conſider mankind as ſeparate individuals, there is no natural injuſtice towards mankind included in theſe offences. But when the ſame offences

[i] See B. I. C. XVIII. §IX. [k] ibid.

appear

appear to the common underſtanding of a civil ſociety, either to diſſolve the bands of civil union, or to obſtruct the general good by making men looſe and profligate in their manners; the ſociety has a right to forbid them: and when they are ſo forbidden, they become matter of ſocial injuſtice, and are puniſhable by the civil magiſtrate. And certainly if ſuch actions, as are in all reſpects indifferent amongſt ſeparate individuals, not only as they do no harm to mankind, but likewiſe as they are not forbidden at all by the law of nature, become puniſhable in a ſtate of ſociety, when the civil laws of the ſociety have forbidden them, in view to the general good; there is no reaſon to imagine, that atheiſm, blaſphemy, profaneneſs, and irreligion, are ſo far ſanctifyed by being in their own nature offences againſt God, as to exempt them from civil penalties, when they are forbidden by the civil law with a like view to the general good.

[l]Grotius doubts, whether in any inſtances the want of benevolence is puniſhable by man. In a ſtate of nature it certainly is not puniſhable for reaſons, which are ſomething different from thoſe aſſigned by our author. Theſe reaſons have already been explaned at large in their proper [m] place. And if we were diſpoſed to allow any weight to our authors argument in favour of his own opinion, when mankind are conſidered as individuals; it has certainly no weight at all, when we conſider them, as united into a civil ſociety. Thoſe vices, he ſays, are not to be puniſhed by men, whoſe oppoſite virtues cannot be produced by conſtraint, ſuch as gratitude, liberality, compaſſion, and kindneſs. When he ſays, that liberality cannot be produced by conſtraint, I ſuppoſe him to mean, that force or fear, though they

[l] L. II. C. XX. § XX. [m] ibid. § IX.

may make a man give his money away, cannot make him liberal; becauſe liberality implys, that he is led to give it away by a diſpoſition to do good. In the like ſenſe it may be ſaid, that force or fear cannot make a man grateful; not becauſe puniſhment, when it is either threatened or inflicted, cannot influence him to make ſuitable returns to his benefactors; but becauſe no returns, which ariſe from conſtraint, and not from the good diſpoſition of his own mind, can be called gratitude. The fear of puniſhment may likewiſe induce a man to aſſiſt thoſe, who ſtand in need of his aſſiſtance: but Grotius would not call the good, which he does, for fear of being puniſhed, if he was to do otherwiſe, by the name of kindneſs; becauſe it does not ariſe from the benevolent diſpoſition of his heart.

Now ſuppoſing it for the preſent to be true, that neither actual puniſhment nor the fear of puniſhment can produce thoſe virtues; the only conſequence is, that puniſhment, when it is either inflicted or threatened, in order to produce them, will be of no benefit to the perſon, upon whom it is inflicted, or againſt whom it is threatened. What he has ſuffered already, or what he may be afraid of ſuffering hereafter, cannot produce theſe virtues in him, ſo as to make him a better man. But in the mean time, though ſuch puniſhment ſhould happen to be of no benefit to the vicious man himſelf, it may be of great benefit to others, by making him a more uſeful member of ſociety, whether he will or not. Though it cannot produce the virtues themſelves, it may produce the outward effect of them. Suppoſe for inſtance, that puniſhment cannot make a man liberal, yet certainly it may force him to give what he can ſpare, from his own expences, to thoſe, who are in need; and it may force him

him likewiſe to ſpare more from his own expences, than he otherwiſe would have ſpared. The naked may be cloathed, and the hungry may be fed with his ſuperfluities, not only when he is led to diſpoſe of them for theſe purpoſes by the good diſpoſition of his heart, but when he is conſtrained thus to diſpoſe of them by the fear of puniſhment. Suppoſe, that puniſhment cannot make a man grateful; it may however ſecure a return of what will be as beneficial to thoſe, who have done him favours, as if he had been led to make the return by his own virtue. Now the juſtice of puniſhment in thoſe inſtances, where no one queſtions its conſiſtency with the law of nature, does not depend upon the benefit, which the criminal receives from it. [m] The primary end of it is to change his outward behaviour for the ſecurity of others: and this end is what makes it juſt to puniſh him; whether the puniſhment produces ſuch a change by mending his inward diſpoſition, or by making him afraid to offend again. If therefore the law of nature allows mankind to puniſh acts of injuſtice, notwithſtanding ſuch puniſhment, whilſt it corrects the outward behaviour of the criminal, may fail of correcting his heart; the ſuppoſed impoſſibility of producing inward benevolence by puniſhment can be no reaſon, why the law of nature ſhould not allow mankind to puniſh acts of inhumanity, inclemency, or ingratitude.

But what has been hitherto ſuppoſed is not univerſally true: we cannot grant, that the fear of puniſhment can never produce a benevolent diſpoſition. Puniſhment perhaps may in the firſt inſtance ſeldom be attended with this effect: but it is not improbable, that

[m] See B. I. C. XVIII. § III.

what a man is conſtrained to do, in the firſt inſtance through fear, may in time and by uſe grow habitual to him. His bad diſpoſition, when it has long been kept under by ſuch conſtraint, may at length be corrected: and thus the puniſhment or the fear, which at firſt produced only the outward effects of benevolence, may by degrees produce the virtue itſelf. The common conſent of mankind favours this opinion. Parents act upon it, when they diſcourage or correct their children for ſuch inſtances of behaviour, as betray a want of gratitude, or liberality, or tenderneſs. They hope by ſuch diſcouragement or correction, not only to reſtrain the outward behaviour of their children, but to bring them by degrees to a better temper of mind.

However, neither the deſign of producing the outward effects of benevolence for the benefit of mankind, nor the deſign of amending the diſpoſition of the vicious for their own benefit, will be ſufficient to give individuals a right of puniſhing the vices, that are oppoſite to this virtue. For though the reaſon here alledged by our author does not prove, that they have no ſuch right; it has been elſewhere proved by other reaſons. We can have no right to make a man ſuffer for not doing what we have no right to demand of him; however reaſonable it might be for us to expect it of him.

But what is matter only of imperfect right or reaſonable expectation amongſt individuals in the liberty of nature, may become matter of perfect right in a ſtate of civil ſociety. A contract, even in the liberty of nature, will give us a right to a thing, which was not our own before: whoever witheld the thing from us, before it was made our own by ſome compact, might perhaps be chargeable with wanting kindneſs: but whoever

ever takes it from us, or witholds it afterwards, is chargeable with injuſtice. This is the effect of compacts in general: and an effect of the ſame ſort may be produced by the ſocial compact in particular. All the members of the ſame civil ſociety bind themſelves, by this compact, to do whatever the common underſtanding, ſpeaking by the laws, ſhall direct them to do, in order to advance or ſecure the general good. And conſequently, whatever outward acts of benevolence the law preſcribes, they become due of perfect right to the ſeveral individuals, who are the objects of thoſe acts: not to do that good, which the law requires to be done, is to withold what is no longer matter of favour, but of ſtrict juſtice. When the want of natural benevolence, in any particular inſtance, is thus become ſocial injuſtice by means of civil laws, which are founded in the ſocial compact, that is, in our own conſent; ſuch want of benevolence, though it was not puniſhable by individuals in a ſtate of nature, will upon the principles of the law of nature be puniſhable by the civil magiſtrate in a ſtate of ſociety.

CHAP. VI.

Of civil laws.

I. *Difference between a civil law and a compact.* II. *Civil constitutions eſtabliſhed partly by law and partly by compact.* III. *Internal and external obligation of civil laws.* IV. *A civil law obliges internally, when it is made and promulgated.* V. *The ſanctions of civil law produce its external obligation.* VI. *Penal ſanctions not eſſential to civil laws.* VII. *Proper matter of civil laws.* VIII. *Matter of natural right and wrong may be matter of civil law.* IX. *Civil laws not confined to matters of natural right or wrong.* X. *Rights of mankind may be changed by civil laws.* XI. *Effect of civil laws on promiſes, contracts, and oaths.* XII. *What obligation to perform a void promiſe, contract, or oath.* XIII. *Effect of civil laws on the promiſes, contracts, or oaths of kings, who have legiſlative power.* XIV. *Effect of civil laws on marriage.* XV. *Civil laws are written or unwritten.* XVI. *Unwritten laws how eſtabliſhed.* XVII. *Unwritten law more difficult to be aſcertained than written law.* XVIII. *Unwritten laws how repealed.* XIX. *Written laws cannot be repealed by preſcription.* XX. *General diviſion of civil laws.* XXI. *In ſome conſtitutions the civil laws of ſucceſſion to the crown cannot be fundamental laws.* XXII. *Controverted ſucceſſion may be ſettled by civil laws.*

Difference between a civil law and a compact.

I. WHEN we conſider only the general notion of a law, there appears to be a plane difference between poſitive laws and compacts. [a] A compact is an act of two or more perſons, which produces an obliga-

[a] See B. I. C. XIII. § I.

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tion upon thoſe, who make themſelves parties to it, by their own immediate or direct conſent. [b] A law is an act of a ſuperiour, which obliges all, who are under his authority, as far as they are concerned in the matter of the law, and as far as the legiſlator intended to oblige them; whether they immediately and directly conſent to it or not.

But the ſuperiority of a civil legiſlator, that is, the right, which a civil legiſlator has to preſcribe laws to the members of a civil ſociety, ariſes from their own conſent: and conſequently, whatever difference there may be between a poſitive law and a compact, when we conſider only the general notion of a poſitive law; the difference between a civil law and a compact is leſs apparent: becauſe the obligation [c] of civil laws, as well as the obligation of compacts, ariſes from the conſent of thoſe, who are obliged by them. The mark of diſtinction between them conſiſts in the different ſort of conſent, from which their obligation ariſes. No perſon is obliged by a compact, beſides thoſe, who make themſelves parties to it by ſome immediate or direct act of conſent. But all perſons are obliged by the laws of a civil ſociety, whether they make themſelves parties to them by any immediate and direct conſent, or not; if they have only made themſelves parties to them by a remote or indirect conſent. When a ſociety is formed for the ſake of carrying on ſome certain purpoſe, whether it is a civil ſociety or a ſociety of any other ſort; the ſeveral [d] individuals, who joyn themſelves to it, either conſent expreſsly, or by the act of ſo joyning themſelves to it, are underſtood tacitly to conſent to

[b] See B. I. C. I §V. [c] See B. II. C. III. § I. B. I. C. X. § III.
[d] See B. II. C. I. § II. Grot. Proleg. XV.

the carrying on this purpoſe by ſuch meaſures, as the common underſtanding ſhall approve and preſcribe. Now the purpoſe, for which a civil ſociety is formed, is the general ſecurity and the general intereſt of the whole and of its ſeveral parts. Every man therefore, by conſenting to make himſelf a member of a civil ſociety, agrees immediately or directly, that theſe purpoſes ſhall be carryed on, and that he will concur in carrying them on, by ſuch meaſures, as the common underſtanding of the ſociety ſhall approve of and preſcribe. Thus far he is engaged only in a compact, which obliges him by means of his own immediate or direct conſent: and without ſuch immediate or direct conſent he would be no party to it, nor be any ways concerned in its obligation. But by this compact he gives the ſociety a legiſlative power over him; that is, he gives it a right to preſcribe ſuch rules for his conduct, as the common underſtanding of the ſociety ſhall judge to be neceſſary or conducive to the general good. And conſequently by the ſame compact he obliges himſelf to obſerve theſe rules, when they are ſo preſcribed; whether at the time of preſcribing them he immediately and directly conſents to them, or diſapproves them and even proteſts againſt them. In the mean time the obligation of theſe rules, which are nothing elſe but the civil laws of the ſociety, is ultimately derived from his own conſent. Though he does not immediately and directly conſent to the laws at the time of making them; yet he remotely and indirectly conſented to them by becoming a party to the ſocial compact. If he had not conſented to make himſelf a party to that compact, the ſociety would have had no legiſlative power over him; and conſequently he would not have been obliged to obſerve any laws that it might preſcribe.

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In ſome other inſtances the difference between that conſent, which makes a law binding upon us, and that conſent, which makes us parties to a compact, lies nearer to view, and may perhaps be ſeen more clearly, than in the complicated buſineſs of civil ſociety. A number of individuals, ſuppoſe twenty, that have no particular connections with one another, have a deſign of engaging in ſome undertaking, which is to be carryed on by their joynt labour and at their joynt expence. When they meet to deliberate upon the proper meaſures, which are to be purſued, each of them is at liberty to judge and to determine for himſelf concerning thoſe meaſures: and though fifteen out of the twenty ſhould agree in their judgment; yet no act of theirs would bind the other five. Nothing can bind all and each of them, but the immediate and direct conſent of all and each. And ſuch an act of conſent is a compact. But ſuppoſe, that theſe twenty individuals, before any particular meaſures were propoſed, had formed themſelves into a ſociety for carrying on the undertaking, which they have in view, and had entered into a general agreement to act joyntly in carrying it on, according to the common ſenſe of the whole number; this agreement would likewiſe have been a compact; it would have obliged each of the individuals no otherwiſe, than as each of them had made himſelf a party to it, by his own immediate or direct conſent. But the effect of ſuch a compact will be, that when any meaſure is approved and preſcribed by fifteen out of the twenty, the other five, though they diſlike it, and diſſent from it, will be obliged to purſue it. Such meaſures or ſuch rules of acting, as are agreed upon by the majority, which ſpeaks the common ſenſe of the whole, are laws

to

to the reſt; they bind the reſt, not as a compact does upon account of their immediate and direct conſent, but upon account of their remote and indirect conſent implyed in a previous compact, by which they obliged themſelves, in whatever relates to the common purpoſe, to obſerve ſuch rules and to purſue ſuch meaſures, as the common underſtanding ſhould approve and preſcribe.

The caſe of a civil ſociety, in a perfect democracy, is exactly the ſame with this: each individual, by becoming a member of the ſociety, conſents to carry on the purpoſes of a civil ſociety joyntly with the reſt, that is, in ſuch a manner and by ſuch means, as ſhall be approved and preſcribed by the joynt underſtanding or common ſenſe of the ſociety. This immediate or direct act of his own conſent is what gives the ſociety a general legiſlative power over him, or a general right to lay down rules for his conduct, in order to ſecure and advance the common good. Whatever particular rules therefore are approved and preſcribed by the majority, which ſpeaks the common ſenſe of the whole ſociety, he is obliged to follow theſe rules, whether he happens to be in the majority or not. On the one hand therefore they are not compacts; becauſe, by the ſuppoſition of his voting with the minority, he does not make himſelf a party to them by any immediate or direct act of his own conſent. But then on the other hand they do not oblige him without his own conſent; becauſe he remotely or indirectly conſented to them, by conſenting originally to purſue the proper purpoſes of a civil ſociety, joyntly with the other members, under the conduct of the common underſtanding.

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In ſuch a perfect democracy, as we have here ſuppoſed, all the members of the ſociety are equal to one another. It may therefore be aſked, in what ſenſe the civil laws of this ſociety can be called the acts of a ſuperiour? But though in a perfect democracy no one individual is ſuperiour to any other individual, and much leſs to all the reſt; yet the whole body conſidered joyntly is ſuperiour to any one of its members conſidered ſeparately. The body of the ſociety, when any individual has united himſelf to it, has a right to direct his actions for the general good by the common underſtanding, and to compel him by the common force to obſerve its directions, if he is unwilling or refuſes to obſerve them otherwiſe. Such a right, as this, is all, that we mean, when we ſay, that civil laws are the acts of a ſuperiour. And this ſuperiority is as intelligible, when it belongs to a great number of individuals acting joyntly, that is, to the collective body of a ſociety, as when it belongs to a legiſlative body conſiſting only of a few, or perhaps only of one.

Civil conſtitutions eſtabliſhed partly by law and partly by compact.

II. The mere act [e] of civil union veſts the civil legiſlative power only in the collective body of the ſociety: no other laws will be binding upon each of the members in conſequence of this ſingle act, beſides thoſe, which are eſtabliſhed by the whole or by the greater part of the whole. Wherever therefore any particular part of a civil ſociety has an excluſive legiſlative power; this power muſt have been veſted in ſuch legiſlative body by ſome farther act of the ſociety. And ſince no civil laws are binding upon the ſeveral individuals, who are members of a civil ſociety, but in conſequence of their own conſent; the act by which

[e] See B. II. C. IV. §

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any legiſlative body, different from the collective body, is eſtabliſhed, muſt be an act of joynt conſent. [f] Sometimes we conſider this act of joynt conſent as a law, and call it the law of the civil conſtitution. Sometimes we conſider it as a compact, and ſay, that a king in monarchies, or the nobles in ariſtocracies, or the repreſentatives of the people in democracies, which are adminiſtered by repreſentatives, derive their power from compact. There is ſome reaſon for calling it by theſe different names; becauſe, in reſpect of what paſſes between the collective body and the ſeveral members, it is a law; and in reſpect of what paſſes between the ſame collective body and the particular perſons, who are called to the office of civil legiſlation and eſtabliſhed into a legiſlative body, it is a compact.

When a civil ſociety, in view to the general good, has agreed to introduce and eſtabliſh any particular form of civil government; the ſeveral members are obliged to ſubmit to this form; though ſome of them might perhaps be of opinion, that it is not a proper or a beneficial form, and might publicly declare, that they do not agree to it. There is no more reaſon in the nature of the thing, why this act of the ſociety ſhould not be binding upon all its members without the immediate and direct conſent of each, than there is, why any other act of the ſociety ſhould not be binding upon all without a like conſent of each. The original compact of civil union gives the collective body a power to oblige each of its members to conform to whatever the common underſtanding approves and preſcribes for the general good. If therefore it ſhould appear to the common underſtanding, that a

[f] Ibid. §

legiſlative

legiſlative body of this or of that particular form will be conducive to the general good, and the majority of the ſociety ſhould agree to eſtabliſh ſuch a legiſlative body; each of the members, even thoſe, who are in the minority, will be obliged to comply with ſuch eſtabliſhment. Thus far the conſtitution of civil government is eſtabliſhed by a law. The legiſlative body, which is to be introduced, does not indeed make this law; for no act of this body, till it is eſtabliſhed, can be binding either upon the ſociety in general or upon the ſeveral members of it in particular. The law therefore which introduces and eſtabliſhes the form of the legiſlative body muſt be the joynt act of the collective body. And this act, when we conſider it in reſpect of the ſeveral members, may rather be called a law than a compact; becauſe it obliges even thoſe, who immediately and directly diſſent from it, at the time of making it; and this obligation ariſes from that remote and indirect conſent, which they gave to the future acts of the ſociety by making themſelves parties to the ſocial compact. But this act of the collective body, though it binds the ſeveral members of the ſociety as a law, can be binding upon the collective body itſelf only as a compact: nothing, but the immediate or direct conſent of the collective body of a civil ſociety, can take from ſuch body the legiſlative power, which it has by means of civil union, and lodge this power excluſively in ſome particular part.

Internal and external obligation of civil law.

III. When the right, which a civil ſociety, or the legiſlative body of ſuch ſociety, has to preſcribe laws to the ſeveral members of it, is called a natural right or a right of the law of nature; it is neceſſary to obſerve in what ſenſe we call it ſo.

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No right of this ſort belongs either to any one man, or to any number of men by the gift of nature. All mankind are placed by nature in a ſtate of equality; and conſequently whatever right any one man may have to preſcribe laws to a number, or whatever right any number of men may have to preſcribe laws to one, this right muſt be of the adventitious ſort and cannot in the ſtricteſt ſenſe of the words be a natural right.

But we frequently enlarge the ſenſe of the word, and mean by the natural rights of mankind, not only ſuch rights, as belonged to them by the gift of nature, but ſuch adventitious rights likewiſe, as either did ſubſiſt, or might have ſubſiſted, in a ſtate of nature. However, the right, which a civil ſociety has to preſcribe laws to its members, cannot be a natural right in this enlarged ſenſe of the words; becauſe the notion of this legiſlative right limits it to a ſtate of civil ſociety.

There is ſtill a third ſenſe, in which the rights of mankind may be called natural rights, or rights of the law of nature: whatever rights are acquired by ſuch means as are natural, or agreeable to the law of nature, are under the protection of this law, and may therefore be called natural rights, or rights of the law of nature; [h] becauſe this law forbids the violation of them. The legiſlative power of a civil ſociety, or of the legiſlative body of ſuch a ſociety, is a right of this ſort. The ſociety acquires it by the immediate and direct conſent of the ſeveral individuals, who make themſelves members of ſuch ſociety; and the legiſlative body acquires it, as by the immediate and direct conſent of the collective body of the ſociety, ſo by the remote and indirect con-

[g] See B. I. C. X. § III. [h] See B. I. C. II. § VIII.

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ſent of the ſeveral members. [i] If therefore we trace the obligation of civil laws back to its higheſt ſource, we ſhall find, that it is derived out of the law of nature. The immediate cauſe of the obligation of civil laws is the authority of the legiſlative body: this authority is veſted in the legiſlative body by a compact, between ſuch body and the collective body of the ſociety: and this compact is binding upon the ſeveral members, in conſequence of their having conſented, and made themſelves parties, to the firſt ſocial compact, which gave the ſociety a right to bind all and each of them to whatever the common underſtanding ſhould approve and preſcribe for the ſecurity and advancement of the general good. But ſince obligations ariſing from conſent are obligations of the law of nature; it follows, that the members of any civil ſociety are obliged by the law of nature to obey the civil laws of it; becauſe the obligation of theſe civil laws ariſes from their own conſent.

The obligation of civil laws, as it is thus derived from the law of nature, reſts upon the conſciences of mankind, and is called the internal obligation of ſuch laws. [k] Whatever is the foundation of moral obligation, in reſpect of any other parts of the law of nature, whether it is the will of God, who has made happineſs the natural effect of our obedience and miſery of our diſobedience, or the ſuggeſtions of a moral ſenſe, or the fitneſs and relations of things, or all theſe principles taken together; there is the ſame foundation of our obligation to obey the laws of our country.

Civil laws, like the law of nature, from which they are derived, might fail of producing their effect; that is, they might fail of ſecuring and advancing the good

[i] Grot. Proleg. 15. 16. [k] See B. I. C I. § VI.

of

of the ſociety in general and of its ſeveral members in particular; if it was wholly left to mens own conſciences, whether they would obſerve theſe laws or not. But wherever the law of nature gives a right to demand, that any thing ſhould be done or be avoided, it likewiſe gives a right to ſupport this demand by the uſe of force. Thus in a ſtate of natural liberty, as the law of nature forbids doing an injury, ſo it gives individuals a right to defend themſelves by force againſt an injury, which they are likely to ſuffer, and to obtain reparation or to inflict puniſhment upon account of an injury, which they have ſuffered. In like manner, where mankind are united into a civil ſociety, as the law of nature forbids the violation of the civil laws of ſuch ſociety, ſo it gives the ſociety a right to make uſe of force for the ſupport of them. The only difference in this reſpect between a ſtate of nature and a ſtate of ſociety is, that in a ſtate of nature this force is in the hands of individuals, and may be uſed at their diſcretion; whereas in a ſtate of ſociety, it is in the hands of the public or of the executive body, and can only be uſed under the direction of the common underſtanding.

If either through want of ſkill or through want of attention we ſee no reaſons in point of conſcience for obeying the laws of our country; or if through malice or through ſelfiſhneſs we allow no weight to thoſe reaſons, when we do ſee them; obedience may ſtill be obtained by means of the common force. The apprehenſion, that this force will interpoſe in ſupport of the laws, and will either prevent us from being gainers, or will perhaps make us loſers, by breaking them, is ſuch a reaſon for obeying them, as lies plane and open to the moſt unſkilful and inattentive, and will be likely

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in point of prudence to get the better of our malice, and to give a turn to our ſelfiſhneſs in favour of obedience. The obligation to obey the laws, which ariſes from this apprehenſion, that the public force will interpoſe in ſupport of them, is called their external obligation.

A civil law obliges internally, when it is made and promulgated.

IV. The civil legiſlator makes or enacts a law, when he requires the ſubjects to do or to avoid this or that, which the law expreſſes. But the mere making of a law does not produce any internal obligation, or bind the ſubjects in conſcience to obſerve it. No man is naturally obliged to obey a law, any farther than he knows, or might know, if he pleaſes, what the law is: the will of the legiſlator can be no rule to him, till he is acquainted with it, or has ſuch an opportunity of being acquainted with it, that, if he is ignorant of it, his ignorance muſt be owing to his own neglect. Civil laws therefore, before they can produce any internal obligation, muſt be promulgated or made known, as well as enacted.

The ſanctions of civil law produce its external obligation.

V. What the legiſlator does farther, beſides enacting and promulgating a law, in order to obtain obedience to it, is called eſtabliſhing it upon ſome ſanction. The external obligation of the law ariſes from its ſanctions, which are nothing elſe but the directions, that the legiſlative gives to the executive concerning the purpoſes, for which the public force is to be uſed, or concerning the manner of uſing it, againſt thoſe, who break the law.

From hence it appears, that the external, as well as the internal, obligation of civil laws ariſes from the legiſlator. For though the public force is in the hands of the executive body, and the laws more immediately

produce their external effect by the uſe of this force, or by the apprehenſion of its being uſed; yet the executive body in this inſtance acts only in conformity with the ſanctions, which the legiſlative has eſtabliſhed.

Penal ſanctions not eſſential to civil law.

VI. The firſt intention of the civil legiſlator in eſtabliſhing a law by any ſanction is to procure obedience to ſuch law, to prevent the harm, which the law forbids, or to obtain the good, which the law commands. But his intention does not ſtop here: if he fails of procuring obedience to the law in the firſt inſtance, his farther intention is to remedy the harm, that has been done by breaking it, and to hinder them, who have broken it once, from doing the like again. Theſe intentions of the legiſlator may be obtained by two ſorts of ſanctions, by ſuch as provide, that he, who breaks the law, ſhall be no gainer, or ſhall not obtain the purpoſes, which he had in view, by breaking it; and by ſuch likewiſe as provide, that he, who breaks the law, ſhall be a loſer by breaking it. If the law ſays, that all deviſes of lands or tenements by will ſhall be void, unleſs the will is ſubſcribed by the teſtator in the preſence of three witneſſes, and is atteſted by thoſe witneſſes; the ſanction of ſuch a law conſiſts in making the will void: the teſtator cannot obtain the purpoſe, which he had in view, by making ſuch a will; and the teſtamentary heir has no temptation to put the teſtator upon making ſuch a will, and no motive to claim under ſuch an one, if it is made, becauſe the law will prevent him from being any gainer by it. When the law forbids doing a damage of any ſort, and commands, that reparation ſhall be made, if ſuch damage is done; the ſanction of the law, which conſiſts only in the command to make reparation, does nothing more

more than hinder any perſon from being a gainer by breaking the law: and ſuch a ſanction provides for obtaining the firſt intention of the legiſlator, that is, it ſecures obedience to the law, only by making it not worth any perſons while to break it. Now if by a penal ſanction we mean the appointment of a puniſhment; ſuch ſanctions as theſe cannot be called penal ſanctions: here is no appointment of a puniſhment; the legiſlator does not aim at ſecuring obedience by threatening to make them loſers, who break the law, or to take any right from them, which they enjoyed before, but only by providing, that they ſhall be no gainers, or that they ſhall obtain no right by breaking it. As ſanctions of this ſort do not in the firſt inſtance aim at ſecuring obedience to the law by threatening puniſhment, ſo neither do they operate afterwards by inflicting puniſhment in order to prevent thoſe, who have broken the law once, from breaking it again. They do not look forward to what may be done hereafter, but only backward upon what has been done already: they do not endeavour to prevent or reſtrain him, who has done wrong once, from doing the ſame or the like wrong at another time; they only endeavour, as far as may be, to undo the wrong, which is paſt. If indeed we call every interpoſition of the public force, to ſupport a law, by the name of puniſhment; then even thoſe laws, which only aim at undoing the wrong, that is paſt, may be ſaid to be eſtabliſhed by penal ſanctions: becauſe when any perſon, who has broken the law, will hold out againſt it, and will keep poſſeſſion of what he has unjuſtly gained by breaking it; the law, which forbids making ſuch unjuſt gain, gives thoſe, who have ſuffered by the wrong, which he has done, a right to the

assistance of the public force, in order to compel him to do them that justice, which he refuses to do otherwise. But certainly, where the sanction of a law produces only such interpositions of the public force as this, it can with no more propriety be called a penal sanction, than what an individual in a state of nature does by his own private force for obtaining reparation of damages can be called a punishment. When the law makes a will void, it will take care, that what is devised in such will shall go to the heir in intestate succession. If the testamentary heir takes possession of the lands and tenements devised by the void will, and keeps possession, till the other obtains a judicial sentence; though what he has done is contrary to the law, yet if he submits to the sentence, after it is given, the law is satisfied. When the sanction looks no farther than the wrong, that he did, without regarding the bad disposition, that led him to do such wrong; it only requires him to undo his own act, and inflicts no evil upon him for having done it. Or suppose, that he holds out after sentence, and that the public force interposes to compel him to quit possession; yet if it interposes for no other purpose, this is no punishment. The design of such interposition is only to make the act void in fact, which the law had made void of right; that is, to undo what has been done already, and not to make him suffer any harm in order to prevent him from doing the like again.

What has here been shewn to be the case in one instance is in general the case of all laws, which consider only the damage, that a man has done by an injury, without considering the disposition of mind, that led him to do it. These laws inflict no punishment, if he is

is willing to make reparation: and even if he is unwilling, though the public force interpoſes in ſupport of the law; yet the deſign of this interpoſition is only to compel him to do what is juſt, and not to puniſh him for having done what is unjuſt.

Penal ſanctions are properly acts of the civil law, by which it appoints, that he, who behaves otherwiſe, than ſuch law directs, ſhall be a loſer, ſhall be deprived of ſome right, which otherwiſe belonged to him, or ſhall ſuffer ſome evil, from which he had otherwiſe a right to be free. But ſince the rules, which the civil legiſlator preſcribes for the general good, not only oblige the conſciences of the ſubjects, but may and do in many inſtances produce their external effect without ſuch appointments; the conſequence is, that penal ſanctions are not eſſential to civil laws.

If we enlarge the notion of penal ſanctions, and include in it any interpoſition of the public force, whether this force interpoſes to compel men to do what is right, or to make them ſuffer ſome evil for having done what is wrong; in this ſenſe of the words, which ſeems however to be an improper one, civil laws muſt be allowed to depend upon penal ſanctions for their external obligation. But ſtill theſe ſanctions are not ſo far eſſential to civil laws, as to make it impoſſible for any civil law to oblige without them: becauſe the bare enacting and promulgating a law produces an internal obligation; though nothing, which can be called a penal ſanction, ſhould be added to the law. Unleſs indeed it ſhould be ſaid after all, that the law of nature itſelf is ſupported by penal ſanctions, and conſequently that all civil laws, ſince their internal obligation is derived from the law of nature, muſt be ulti-

mately ſupported by the ſame ſanctions with the law of nature.

Proper matter of civil laws.

VII. As the purpoſes, for which men unite themſelves into civil ſocieties, determine the nature and terms of the ſocial compact; ſo the nature and terms of this compact, which is the foundation of civil legiſlative power, determine what are the proper objects of this power. Each individual is led by a view to his own ſecurity and benefit to aſſociate with the reſt; and they, by receiving him amongſt them, as a member of the body politic, agree to aid him in purſuing this end. But ſince each and all of them have the ſame end in view; they cannot be ſuppoſed to receive him upon any other terms, but thoſe of his conſenting to joyn with them in maintaining their ſecurity and benefit. And conſequently he, by the act of joyning himſelf to them, muſt be underſtood to agree to theſe terms. Thus the particular intereſt of each member is taken under the protection of the whole; ſo that the whole obliges itſelf to act for his ſecurity and benefit: but at the ſame time a common intereſt of the whole is formed; and each member obliges himſelf to act joyntly with the reſt for this common intereſt. The claim of each member upon the ſociety is limited by the obligation, that he lays himſelf under towards the ſociety, and by the obligation, that the ſociety is under towards each of the other members. He can have no claim upon the ſociety to act for his ſecurity and benefit, where it interferes with the common ſecurity and benefit of the whole; becauſe he is obliged to act with the ſociety for this common ſecurity and benefit: and whilſt he lays himſelf under this obligation, he cannot be underſtood to acquire any claim, which is inconſiſtent with it.

it. He can likewiſe have no claim upon the ſociety to act for his ſecurity and benefit, where it is inconſiſtent with the ſecurity and benefit of any of the other members: becauſe the ſociety is under the ſame obligation in reſpect of the others, that it is under in reſpect of him: and conſequently it could not engage to advance his intereſt at the èxpence of theirs.

Upon the whole therefore, a number of individuals, by joyning in a ſocial compact, oblige themſelves to act together, for the purpoſes of obtaining the common good of all, and the particular good of each; as far as the particular good of any one is conſiſtent with the common good of all, and with the particular good of others. But where a number of perſons bind themſelves to act joyntly for any purpoſes, the common underſtanding of ſuch ſociety is their guide, in reſpect of what they are to do, and what they are to avoid, in order to obtain thoſe purpoſes. A civil ſociety therefore has a right, by its common underſtanding, thus to guide itſelf and its ſeveral members. And ſince the legiſlative power of ſuch ſociety conſiſts in this right, it follows, that whatever is neceſſary or conducive to the common good of the ſociety, or to the particular good of the ſeveral members, as far as the particular good of any one is conſiſtent with the common good of all, and with the particular good of others, is the proper object of legiſlative power. Now civil laws are nothing elſe but ſuch rules, as the legiſlative power of a civil ſociety eſtabliſhes for the direction of all and of each of its members. Whatever therefore is the proper object of civil legiſlative power, is likewiſe the proper matter of civil laws.

Matter of natural right and wrong may be matter of civil law.

VIII. From hence it appears, that the matter of civil laws is not confined to ſuch things, as the law of nature has left indifferent by neither commanding nor forbidding them. The law of nature commands whatever is neceſſary or conducive to the ſecurity and benefit of mankind in general, and forbids the contrary. As far therefore as what is neceſſary or conducive to the ſecurity and benefit of mankind in general, is neceſſary or conducive likewiſe to the ſecurity and benefit of that particular part of mankind, which is united into the ſame civil ſociety; and as far as what is inconſiſtent with the ſecurity and benefit of mankind in general, is inconſiſtent likewiſe with the ſecurity and benefit of that particular part of mankind, which is thus united; the civil legiſlator is employed about the proper objects of his legiſlative power, when he commands the former or forbids the latter. His laws therefore contain what is a proper matter of civil law, when they command ſuch actions, as the law of nature has commanded, or forbid ſuch actions, as the law of nature has forbidden.

Mankind are indeed obliged to do what the law of nature commands, and to avoid what this law forbids, without the aid of civil inſtitutions. But we cannot conclude from hence, that it is needleſs, and much leſs, that it is improper, for civil laws to command what is naturally a duty, or to forbid what is naturally a crime. For though the members of a civil ſociety are obliged to obſerve the law of nature; whether its rules and precepts are tranſcribed into the civil law and adopted by it or not; yet, till they are thus tranſcribed and adopted, the obligation to obſerve them reſts only upon the conſcience.

It may perhaps be aſked, whether the law of nature has

has not an external, as well as an internal ſanction in a ſtate of nature; whether mankind have not a natural right, where any injury has been done by breaking this law, to make uſe of their private force to obtain reparation and to inflict puniſhment? And if ſuch an external ſanction takes place in a ſtate of nature, it may be farther aſked, whether the law of nature is not naturally ſupported in a ſtate of civil ſociety by the like ſanction, without being made a part of the civil law of the ſociety?

In anſwer to theſe queſtions, we may obſerve, that this external ſanction of private force reaches in a ſtate of nature no farther than [1] the duties of juſtice, and that the duties of imperfect obligation are ſupported only by the internal ſanctions of the law of nature. The law of nature obliges mankind to promote the good of one another: but this obligation, in a ſtate of nature, is of the internal ſort: no man has a right to compel others by force to do any thing, which is matter of favour; however reaſonable it may be in him to expect the favour from them, and however wrong it may be in them not to do it. Nothing therefore in a ſtate of civil ſociety, beſides the ſocial compact, or ſome civil law, which is founded in this compact, can bind the ſeveral members of ſuch a ſociety to do good either to one another, or even to their country, ſo as to make the doing good a matter of ſtrict juſtice, which may be ſupported by the external ſanction of force. But the obligation of the ſocial compact is only a general one to advance the common good of all or the particular good of each: it is left to the joynt or common underſtanding, that is, to the civil legiſlator, to determine in what inſtances and by what means this good is to be

[1] See B. I. C. XVII. § III. C. XVIII, § IX.

done.

done. And conſequently if civil laws are not neceſſary to enforce the law of nature in reſpect of any other duties; they are at leaſt neceſſary to enforce it in reſpect of the duties of imperfect obligation.

This however is not the only reaſon, why it is neceſſary for civil laws to eſtabliſh the duties of the law of nature. Not only thoſe natural duties, which in a ſtate of nature have no external ſanction, but thoſe likewiſe, which in a ſtate of nature are ſupported by the external ſanction of private force, would in a ſtate of civil ſociety have no external ſanction, without the aid of civil laws. For [m] ſocial union reſtrains thoſe, who are members of the ſame civil ſociety, from making uſe of any private force againſt one another: ſo that no external ſanction can be left in reſpect of any duty whatſoever, beſides what comes from the public force. But the public force is under the guidance of the common underſtanding; it cannot act of right either in matters of defence, or in matters of reparation, or in matters of puniſhment, any otherwiſe than as the common underſtanding directs it. No injury therefore can be guarded againſt, no reparation can be obtained, and no puniſhment can be inflicted, unleſs the injury, which is to be guarded againſt, or to be made amends for, or to be puniſhed, is contrary to the civil laws: becauſe the civil laws contain thoſe directions of the public underſtanding, which the executive body is to follow in uſing the public force.

If puniſhment in a ſtate of civil ſociety can only be inflicted of right by the public force; and if the public can only of right inflict puniſhment, as the laws direct it; the concluſion from hence will be, that no

[m] See B. II. C. V. § II. VII. IX.

action

action can of right be punished in a state of civil society, unless the civil laws have forbidden it. This will explane what we frequently hear, that such or such acts are very malicious and very unjust, that they deserve punishment as much or more than some others, which the law does punish; and yet that these may be done with impunity. These acts, which are said to be so malicious or unjust, as to deserve punishment, are such as would be punishable by private force, if every member of a civil society had the same liberty of acting for himself, that individuals had in a state of nature; or they would be punishable by the public force of the society, if the public force had no rule to guide it, besides the law of nature. But civil union has taken from the individuals the liberty of punishing by their own private force; and the public force of a civil society is under the direction of the civil law. If therefore the acts, how malicious or unjust soever they may appear to be, are such as have not been forbidden and made punishable by some civil law, either written or unwritten; they cannot of right be punished, by the members of a civil society either acting separately as individuals, or acting joyntly by the executive body.

It may however be proper to observe by the way, that this civil impunity does not make such acts innocent: the law of nature has made them crimes, notwithstanding the civil law may have omitted to make them so, or to forbid them under any penal sanction. They therefore, who are guilty of such acts, though they may escape human punishment, must stand condemned by the law of nature, and be liable to the natural sanctions, by which the divine author of this law has thought fit to establish it.

IX.

Civil laws not confined to matters of natural right and wrong.

IX. Though civil laws may command ſuch things, as the law of nature has commanded, or forbid ſuch things, as this law has forbidden; yet civil legiſlators are not confined from commanding or forbidding any thing elſe. What is naturally right or wrong is a proper matter of civil laws; but it is not the only proper matter of them. The ſocial compact gives the ſociety a right to command what is for the common good of the body or for the particular good of its ſeveral members, and of forbidding the contrary. But the law of nature has left many acts indifferent, as doing neither good nor harm to mankind in general, which yet may be beneficial or hurtful to a particular body of men united into a civil ſociety. It is matter of indifference, as to the good or harm of mankind in general, what ſort of cloaths I buy and wear, whether they are ſuch, as have been manufactured by thoſe, who live near me, and ſpeak the ſame language, that I do, or by others, who live at a diſtance and ſpeak a different language. It may indeed be moſt for the benefit of my neighbours, that I ſhould trade with them and wear only ſuch cloaths, as they deal in: but it will be of equal benefit to thoſe, who live in the indies, that I ſhould wear ſuch cloaths, as they only can furniſh me with. The law of nature therefore, obliging me only to regard the benefit of mankind in general, leaves it indifferent to me, whether I buy and wear ſuch cloaths, as are manufactured in the indies, or ſuch, as are manufactured in the place where I happen to live. But when they, who live near me, are united with me into the ſame civil ſociety; if it appears to the public underſtanding to be for the benefit of ſuch ſociety, that no member of it ſhould buy

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or wear ſuch cloaths, as are manufactured in the indies; the ſocial compact has given the ſociety a right to forbid this, or to make it criminal by a civil law, and then to puniſh me or any other member of the ſociety for doing it. The law of nature, as it ſtood in a ſtate of nature, has preſcribed no particular form for the marriage contract, and has not enjoyned, that the parties ſhould make it in any particular place. The form therefore of this contract is indifferent, provided it contains in ſubſtance all, that is naturally eſſential to marriage; and the place, where the parties are, when they make it, is likewiſe indifferent. But if it appears to the common underſtanding of a civil ſociety to be for the general good, that all marriages ſhould be ſolemnized under ſome particular form, and in ſome particular places; the civil legiſlator has a right to preſcribe by law, that all marriages ſhall be ſolemnized under ſuch form, and in ſuch places, and to puniſh thoſe, who ſhall ſolemnize any marriage otherwiſe.

Perhaps it may appear at firſt ſight, that whatever civil laws enjoyn or forbid with a view to obtaining good, or preventing harm, to the body politic or to its ſeveral members, is only matter of natural right or wrong. What in a ſtate of nature was not matter of natural right or wrong, may ſeem to have been made ſo in a ſtate of civil ſociety by means of civil union. For the compact, by which men are united into a civil ſociety, may be thought naturally to oblige them to do whatever is neceſſary or conducive to the general good of ſuch ſociety, and of its ſeveral members, and to avoid the contrary; whether the former is commanded, and the latter forbidden by any expreſs civil laws or not. But this is not preciſely true. The

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ſocial compact obliges them in point of juſtice to do, not whatever is for the common intereſt in their own private opinion, but only what they are directed to do for this purpoſe by the common underſtanding: in like manner it obliges them in point of juſtice to avoid, not whatever may be hurtful to the common intereſt in their own private opinion, but only what they are directed to avoid with this view by the common underſtanding. Till the civil laws therefore, which are the dictates of the common underſtanding, have enjoyned or forbidden what in a ſtate of nature was indifferent; it continues to be ſo far indifferent, as to the members of a civil ſociety, that it is no duty of ſtrict juſtice to do or to avoid it. I would not be underſtood to mean, that a man is under no obligation of any ſort to do what he thinks will be for the good of his country, or to avoid what he thinks will be hurtful to it; till the civil laws have enjoyned the one or forbidden the other. I only ſay, that till then, it is not a duty of ſtrict juſtice; or that the ſocial compact does not give the ſociety a perfect right to demand this of him: becauſe this compact does not oblige him to guide himſelf in obtaining the purpoſes of a civil ſociety by his own judgment, but by the common judgment of the whole. This will appear to be the caſe, if we conſider the difference between a ſtrictly juſt member of a civil ſociety, and a good patriot. The former is exactly punctual in complying with the laws of his country; whilſt the latter, as far as he is able to judge, avoids every thing, which may be hurtful to the public, and does every thing, which may be beneficial to it, even in thoſe inſtances where the laws are ſilent. The ſocial compact itſelf is

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ſo far from binding a man in ſtrict juſtice to hold this conduct, that the laws, which are founded in this compact, will frequently oblige him to do what in his own opinion may be hurtful to the ſociety, and to avoid what in his own opinion might be beneficial to it. But if, whatever his own opinion may be, the civil laws are his proper guide, as to what is due to the ſociety, of which he is a member, in conſequence of the ſocial compact; it follows, that what was indifferent in a ſtate of nature, will be ſo far indifferent in a ſtate of civil ſociety, whilſt it is neither enjoyned nor forbidden by the civil laws, that the members of ſuch ſociety will be at liberty to do it or to omit it without being chargeable with acting contrary to their ſocial compact.

Rights of mankind may be changed by civil laws.

X. The rights of mankind, as far as they conſiſt in a full liberty of doing certain actions, or of poſſeſſing certain things, may be altered or reſtrained or given up by their own conſent. Every compact produces this effect; it limits or reſtrains or takes away ſome right, that is, ſome inſtance of liberty, which the parties to it were poſſeſſed of, before they engaged in ſuch compact. And we have [n] already had occaſion to ſhew, that the ſocial compact in particular produces this effect upon ſuch rights of mankind, as ariſe out of an injury: it reſtrains their liberty of defending themſelves, of obtaining reparation for damages, and of inflicting puniſhment, by the uſe of their own private force under the conduct of their own judgment. But this is not the only effect of this compact. As it alters or reſtrains ſome of the rights of mankind immediately or directly, ſo it ſubjects others of them to be

[n] See B. II. C. V.

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altered or reſtrained by the legiſlative power of civil ſociety: and thus whatever alterations or reſtraints are produced in them afterwards by civil laws, which are acts of ſuch legiſlative power, ariſe from this compact remotely or indirectly.

They, who maintain, that the liberty of individuals is univerſally unalienable, would do well to ſhew, how the obligation of civil laws is conſiſtent with this principle; how individuals, who in a ſtate of nature were at full liberty in any particular inſtance to act as they pleaſed, can be obliged, by the laws of their country, when they are members of a civil ſociety, to act in this inſtance in one particular manner, or not to act at all, and yet have the ſame full liberty of acting, as they pleaſed, that they had before, and would ſtill have had, if they had not by compact united themſelves to ſuch ſociety. For certainly, if they have given the ſociety a power to reſtrain their liberty of judging and of acting for themſelves; their liberty muſt be alienated: as far as the ſociety has a power to reſtrain them, they muſt have given up a part of their liberty.

This power of civil ſociety to alter or reſtrain the rights of mankind, is limited by its own nature. It extends no farther than the purpoſes of the ſocial compact, by which it was produced: as the parties to this compact only bind themſelves to act for the common good of the whole ſociety and of its ſeveral parts; ſo the power, which is produced by this compact, can, in its own nature, extend only to ſuch reſtraints or alterations of any of the rights of mankind, as in the judgment of the common underſtanding are neceſſary or conducive to thoſe purpoſes. Civil legiſlative power therefore is not in the ſtrict ſenſe of the word an abſo-

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lute power of reſtraining or altering the rights of the ſubjects: it is limited in its own nature to its proper objects, to thoſe rights only, in which the common good of the ſociety, or of its ſeveral parts, requires ſome reſtraint or alteration. So that whenever we call the civil legiſlative power either of ſociety in general, or of a particular legiſlative body within any ſociety, an abſolute legiſlative power; we can only mean, that it has no external check upon it in fact: for all civil legiſlative power is in its own nature under an internal check of right: it is a power of reſtraining or altering the rights of the ſubjects for the purpoſes of advancing or ſecuring the general good, and not of reſtraining or altering them for any purpoſe whatſoever, and much leſs for no purpoſe at all. This internal check may poſſibly fail of guarding the rights of individuals againſt undue reſtraints or alterations: becauſe by the conſent of ſuch individuals, when they become members of a civil ſociety, they left it to the common underſtanding of ſuch ſociety to determine what reſtraints or alterations of their rights might be neceſſary or conducive to the general good; and the ſociety may poſſibly abuſe this truſt. The danger is ſtill greater, if the ſociety has gone farther, and has eſtabliſhed a particular legiſlative body: for this point is then left to be determined by the underſtanding of ſuch legiſlative body. To prevent ſuch abuſe it is neceſſary to provide ſome external checks upon the exerciſe of civil legiſlative power; more eſpecially where it is not exerciſed by the whole collective body of the ſociety, but by ſome particular part of it, which is called its legiſlative body. For though it is poſſible, that the whole collective body, if it could conveniently meet together, might in the laws,

altered or reſtrained by the legiſlative power of civil ſociety: and thus whatever alterations or reſtraints are produced in them afterwards by civil laws, which are acts of ſuch legiſlative power, ariſe from this compact remotely or indirectly.

They, who maintain, that the liberty of individuals is univerſally unalienable, would do well to ſhew, how the obligation of civil laws is conſiſtent with this principle; how individuals, who in a ſtate of nature were at full liberty in any particular inſtance to act as they pleaſed, can be obliged, by the laws of their country, when they are members of a civil ſociety, to act in this inſtance in one particular manner, or not to act at all, and yet have the ſame full liberty of acting, as they pleaſed, that they had before, and would ſtill have had, if they had not by compact united themſelves to ſuch ſociety. For certainly, if they have given the ſociety a power to reſtrain their liberty of judging and of acting for themſelves; their liberty muſt be alienated: as far as the ſociety has a power to reſtrain them, they muſt have given up a part of their liberty.

This power of civil ſociety to alter or reſtrain the rights of mankind, is limited by its own nature. It extends no farther than the purpoſes of the ſocial compact, by which it was produced: as the parties to this compact only bind themſelves to act for the common good of the whole ſociety and of its ſeveral parts; ſo the power, which is produced by this compact, can, in its own nature, extend only to ſuch reſtraints or alterations of any of the rights of mankind, as in the judgment of the common underſtanding are neceſſary or conducive to thoſe purpoſes. Civil legiſlative power therefore is not in the ſtrict ſenſe of the word an abſolute

lute power of reſtraining or altering the rights of the ſubjects: it is limited in its own nature to its proper objects, to thoſe rights only, in which the common good of the ſociety, or of its ſeveral parts, requires ſome reſtraint or alteration. So that whenever we call the civil legiſlative power either of ſociety in general, or of a particular legiſlative body within any ſociety, an abſolute legiſlative power; we can only mean, that it has no external check upon it in fact: for all civil legiſlative power is in its own nature under an internal check of right: it is a power of reſtraining or altering the rights of the ſubjects for the purpoſes of advancing or ſecuring the general good, and not of reſtraining or altering them for any purpoſe whatſoever, and much leſs for no purpoſe at all. This internal check may poſſibly fail of guarding the rights of individuals againſt undue reſtraints or alterations: becauſe by the conſent of ſuch individuals, when they become members of a civil ſociety, they left it to the common underſtanding of ſuch ſociety to determine what reſtraints or alterations of their rights might be neceſſary or conducive to the general good; and the ſociety may poſſibly abuſe this truſt. The danger is ſtill greater, if the ſociety has gone farther, and has eſtabliſhed a particular legiſlative body: for this point is then left to be determined by the underſtanding of ſuch legiſlative body. To prevent ſuch abuſe it is neceſſary to provide ſome external checks upon the exerciſe of civil legiſlative power; more eſpecially where it is not exerciſed by the whole collective body of the ſociety, but by ſome particular part of it, which is called its legiſlative body. For though it is poſſible, that the whole collective body, if it could conveniently meet together, might in the laws,

which it makes, exceed the limits of legiſlative power, and reſtrain or alter the rights of individuals, where the good of the whole or of its ſeveral parts required no ſuch reſtraint or alteration; yet it is not very likely, that this would happen: becauſe, as each of the members will be ready to take care of his own particular intereſt, it is not likely, that any of the rights of individuals ſhould be altered or reſtrained by the act of all or of a majority, unleſs the reſtraint or alteration was neceſſary or conducive to the proper ends of a civil ſociety. But where the legiſlative power is entruſted, with a part of the ſociety; if this legiſlative body has no checks upon it, beſides the internal check of natural right; it might be led by motives of private intereſt, or by caprice, or by partial regard, to alter or reſtrain the rights of ſome or of all the ſubjects, without any view to the general benefit. It is the buſineſs of the politician, in order to guard againſt any ſuch exceſs in the exerciſe of legiſlative power, to contrive ſome external checks upon the legiſlative body. I call them external checks to diſtinguiſh them from the internal check ariſing from a ſenſe of what is right; though perhaps ſome, which are made uſe of for this purpoſe, as they ariſe from the nature of the legiſlative body, might themſelves be called internal ones. When the legiſlative body conſiſts of two, three, or more conſtituent parts, ſo that no law can be made without the joynt act of all theſe parts; they may be a check upon one another. And this will be more likely to be the caſe; if they are ſo different from one another, that what might be for the private intereſt of one of them, would not be for the private intereſt of another of them; though what is for the common benefit of the whole ſociety will in ſome reſpect

reſpect or other be for the particular benefit of them all. This check will be the more effectual; if one or more of theſe conſtituent parts of the legiſlative body conſiſts of a number of perſons, each of which in his private capacity is ſubject in all reſpects to the ſame laws with the reſt of the people. For each member of ſuch conſtituent part of the legiſlative body will be the more careful about unduly altering or reſtraining the rights of the other members of the ſociety; ſince in whatever manner, or in whatever degree, the rights of others are altered or reſtrained, his own rights will likewiſe be altered or reſtrained in the ſame manner and in the ſame degree. If one of theſe conſtituent parts of the legiſlative body conſiſts of temporary repreſentatives of the people, that is, of perſons, who are choſen by the bulk of the ſociety, and return again after a certain time to their private ſtation and to a level with the reſt of the ſubjects, unleſs the ſociety will chuſe them into the ſame office and truſt again; this will be a farther check upon the legiſlative body, and will help to reſtrain it from any undue exceſs in the exerciſe of legiſlative power: becauſe the bulk of the ſociety will have frequent opportunities of providing for its own intereſt, by diſplacing thoſe, who have been concerned in any ſuch exceſs, and returning ſuch a body of repreſentatives, as may take care, that the rights of individuals ſhall be no otherwiſe altered or reſtrained, than the ends of civil ſociety require. Such checks as theſe, which the conſtitution of the civil government in any nation has provided, for preventing any undue exerciſe of legiſlative power, are called conſtitutional checks. Perhaps many others beſides theſe might poſſibly be contrived; but it is not our buſi-

neſs here to enquire, either what others might be contrived, or how any checks of this ſort operate to produce the end, which is propoſed by them. This is the province of politics and not of natural law.

As the nature and ends of civil legiſlative power limit it in ſome inſtances, ſo the nature of the rights of mankind limit it in others. Some of the rights of mankind imply a duty, which is required of them by the law of nature or the law of God. Every man has an unalienable right to do what theſe laws command, and to avoid what theſe laws forbid.

[d]But even ſuch rights, as imply a duty, conſiſt in a liberty, though not in a full liberty of acting. We are naturally at liberty to do what the law of nature or of God commands; not becauſe we are at liberty to do the contrary; but becauſe we are naturally free from all external force, that might compel us to do the contrary. Thus likewiſe we are naturally at liberty to avoid what the law of nature or of God forbids, not becauſe we are at liberty to do otherwiſe, but becauſe nature has not ſubjected us to any external force, that might compel us to do otherwiſe. The law of nature or of God has left ſome things indifferent, by neither commanding nor forbidding them: in ſuch inſtances as theſe, our right of acting conſiſts in a full liberty of doing them or of not doing them, juſt as we pleaſe. The ſame laws have made ſome things duties and others crimes; in theſe inſtances we have not a full liberty, but are obliged to do the one, and not to do the other: ſo that here our rights conſiſt in a liberty on one ſide only, that is, in a liberty of obeying thoſe laws, or in a freedom from all external force, that might compel us to diſobey them.

[d] B. I. C. II. §III.

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Now though our [a] rights are alienable, or may be parted with by our own conſent, where they are abſolute, or conſiſt in a full liberty of acting, as we pleaſe; yet they are unalienable, where they conſiſt in a liberty, which is not full and abſolute, in a liberty of acting only one way, or in a freedom from being liable to be compelled to act otherwiſe. The general rule concerning alienable and unalienable rights is, that thoſe are alienable, which are not reſtrained or limited by any law; but that thoſe, which are ſo reſtrained and limited, are unalienable. Where the laws of nature and of God have left an action indifferent, by neither commanding nor forbidding it; our right to do or not to do that action is full and abſolute; it is not reſtrained or limited either by the law of nature or by the law of God; and conſequently we may, conſiſtently with theſe laws, alienate this right; that is, we may by our own conſent give others a power to direct us to act either this way or that for ſome reaſonable purpoſe. But where the law of nature or the law of God has commanded an action and made it a duty, or has forbidden an action and made it a crime; in reſpect of ſuch actions, our right, or liberty of acting, as we pleaſe, is not full and abſolute; it is reſtrained and limited by the ſame law, which has commanded or forbidden the action; ſo that it conſiſts only in a freedom from being compelled to diſobey the law. We cannot therefore conſiſtently with the law alienate ſuch rights; that is, we cannot part with our liberty, any farther than we have it: we may by our own conſent give others a power to enforce the obligations of the law of nature or of God; but theſe laws, as they oblige us to act in one particular manner, have

[a] See B. I. C. II. §III. IX.

not left us at liberty to oblige ourſelves by our own conſent to act otherwiſe, or to give others by ſuch conſent a power of compelling us to act otherwiſe. But if mankind cannot by conſent or by compact give others a power of binding them to do what the law of nature or of God has commanded, or to neglect what either of theſe laws has forbidden; the legiſlative power of civil ſociety, which is derived from conſent or compact, cannot imply a power of binding the members of ſuch ſociety to act contrary to theſe laws.

If I had not thought it neceſſary to apply here what has been already ſaid, concerning the nature of the rights of mankind, and concerning the diſtinction of them into ſuch as are alienable, and ſuch as are unlienable; we might have come to this concluſion more readily. No man can oblige himſelf by his own conſent to act one way, when he is already obliged to act the contrary way. But every man is originally obliged to do what the laws of nature or of God command, and to avoid what theſe laws forbid: ſo that notwithſtanding individuals may bind themſelves by their own conſent to do or to avoid what God by his natural or his revealed law has neither commanded nor forbidden; they cannot ſo bind themſelves to do what he has forbidden, or to neglect what he has commanded. And ſince the ſocial compact itſelf, and civil laws, which derive their authority from this compact, are obligations ariſing from conſent, either immediately and directly, or remotely and indirectly; the conſequence is, that no man can be obliged, either by civil union or by civil laws, to act contrary to the natural or to the revealed law of God.

In applying this general principle to particular inſtances, we

we are apt, for want of attention, to make two miſtakes. The firſt of theſe miſtakes is, that ſince civil laws cannot oblige us to do what is contrary to the law of nature, or cannot ſo change the law of nature, as to make any action lawful, which this law has forbidden, we are apt to conclude, that whatever action is contrary to the law of nature, whilſt the civil law is ſilent about it, muſt neceſſarily continue to be contrary to the law of nature, notwithſtanding any appointment of the civil law in relation to it. But upon a cloſer enquiry into this matter, we ſhall find, that the appointment of civil law, nay that even the act of an individual, can make it naturally lawful to do or to omit what without ſuch appointment of the civil law or ſuch act of the individual could not have been lawfully done or omitted.

The law of nature, in a ſtate of equality, forbids me to force a man to work or labour for my benefit, who has not bound himſelf to me by his own conſent for this purpoſe. But after he has ſo bound himſelf, ſuch force is no longer contrary to the law of nature: not becauſe the law of nature is changed by his conſent; but becauſe his circumſtances and mine are changed by it. The law of nature ſtill continues to forbid me to force any man to work or labour for my benefit, who has not bound himſelf to me, by his own conſent, thus to work or labour: but after he has ſo bound himſelf, this particular precept of the law of nature is no longer the meaſure of what is juſt and unjuſt between him and me. As long as his right to his liberty continues, my natural obligation not to force him to do what he has no mind to do continues too: but when he has parted with this right by voluntarily making himſelf my ſervant; the natural obligation on

my part ceaſes, and in conſequence of his conſenting to be my ſervant, I have acquired a right to force him to work for me, whether he is afterwards willing to work or not. It is contrary to the law of nature to take a mans goods from him: but after he has ſold them to me, if he refuſes to deliver them upon my paying him the purchaſe money, the law of nature does not forbid me to take them from him: not becauſe the law of nature is changed; for what was forbidden by it before, is forbidden by it ſtill; but becauſe thoſe goods, which were his own once, have ceaſed to be his own now: and thus the precept of the law of nature, which was, in reſpect of theſe goods, the meaſure of right and wrong between him and me, ceaſes to be the meaſure in conſequence of his having given up his property in the goods by his own conſent. [p] When I owe money to a man, the law of nature commands me to pay it: but my creditor without changing the law of nature can ſet aſide the obligation of this command as to himſelf, by releaſing the debt without payment: for though the law of nature ſtill commands me to pay what I owe; it ceaſes to command me to pay any thing to him, becauſe by his releaſe I ceaſe to owe him any thing. In general we may ſay, that no obligation of the law of nature can be ſet aſide by the act of the party himſelf, who is under ſuch obligation: but where the obligation correſponds to ſome alienable right of others, they by relinquiſhing their right can releaſe him from the obligation. Neither do they by their act change the law of nature, when they ſet his obligation aſide: they only change his circumſtances and their own; and then the particular precept of the

[p] Grot. L. I. C. I. § X.

law

law of nature, which before was the meaſure of right and wrong between him and them, ceaſes to be ſo upon this change of circumſtances.

From hence it will appear in what manner the civil law produces its effect; when ſuch acts as were contrary to the law of nature before any appointment of civil law concerning them, become conſiſtent with it in conſequence of ſuch appointment. No perſon by his own conſent, either in the ſocial compact or otherwiſe, could give the ſociety, or the legiſlative body of the ſociety, a power to diſpenſe with his doing what the law of nature has obliged him to do, or to authorize his doing what the law of nature has obliged him not to do. But where his obligations correſpond to ſuch alienable rights of others, as are ſubjected by the ſocial compact to the juriſdiction of the civil legiſlative power; the ſociety has a power to reſtrain or to take away their rights, and by this means his obligation ceaſes. It is contrary to the law of nature to take a perſons goods from him: but if the civil law has required the ſubjects to pay ſome tax for the ſupport of the ſociety; the officers, who are employed to collect this tax, if the civil law has authorized them, may, conſiſtently with the law of nature, take from any ſubject, who refuſes to pay his ſhare, ſuch goods as will ſell for as much money as he ought to pay: not becauſe the civil law can authorize them to take another mans property from him; but becauſe the goods, which otherwiſe would have been his property, ceaſe to be ſo by the appointment of the law. He has a right to his goods indeed, and whilſt this right ſubſiſts, it would be contrary to the law of nature to take them from him. But the law of nature does not forbid

bid him to part with this right: and as far as it is neceſſary for him to contribute, with the other members of the ſociety, to the ſupport of the public, he has parted with this right, or however has ſubjected it to the juriſdiction of the public, by making himſelf a party in the ſocial compact.

Since the civil law, when it thus releaſes a perſon from any of the duties of the law of nature, which he owes to other men, operates by an indirect act, that takes away ſuch of their rights, as correſpond to theſe duties; we may obſerve by the way, that it cannot releaſe him in the ſame manner from any of the duties, which he owes by the law of nature either to himſelf or to God: becauſe in theſe duties there are no correſponding rights, which are ſubject to the juriſdiction of civil ſociety.

When we find it laid down as a general principle, that civil authority cannot eſtabliſh any thing, which is contrary to the laws of nature or of God; we are apt to fall into a ſecond miſtake, in applying this principle. We are apt to imagine, where the laws of nature or of God relate to perſons, who are in particular circumſtances, that it is not only impoſſible for any civil juriſdiction to diſpenſe with their obligation, when they are in theſe circumſtances, but that it is likewiſe impoſſible for any civil juriſdiction to make their obligation void by preventing them from bringing themſelves into theſe circumſtances: we are apt to imagine, that, where a duty of the law of nature or of God takes place upon the performance of ſome certain act, this act itſelf is not under the juriſdiction of civil ſociety, and cannot be made void by the civil legiſlator.

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The moſt remarkable inſtances of this ſort are the obligations ariſing from promiſes, contracts, or oaths, and the obligations ariſing from marriage. Theſe are points of ſome difficulty, and with the readers leave we will examine them particularly.

Effect of civil laws on promiſes contracts and oaths.

XI. [q] No act of the civil law can excuſe a man from performing a promiſe, or a contract, or an oath, by which he is bound: becauſe where the obligation ariſing from any of theſe acts ſubſiſts, the law of God, either as it is collected from natural reaſon, or as it is declared in his revealed word, requires performance. But the true ſtate of the queſtion, concerning the effect of civil laws in relation to theſe acts, is, not whether the civil power can excuſe performance, where there is an obligation upon a man ariſing from any of them; but whether the civil power cannot hinder the obligation from taking place. Though a man, when he is in ſuch circumſtances as to be bound by his promiſe, contract, or oath, cannot be excuſed from performance by the civil law; yet it is no conſequence, that the civil law cannot hinder him from being in thoſe circumſtances

Now the civil law can hinder or make void the obligation of a promiſe, contract, or oath two ways; either by ſuch an act, as affects the promiſer, contracter, or juror immediately; or by ſuch an act, as immediately affects thoſe, to whom the promiſe, contract, or oath relates, and in the mean time affects him only remotely. And farther where the act of the civil law affects him immediately, it may be either antecedent or ſubſequent to the promiſe, contract, or oath.

When the civil laws have antecedently forbidden the members of any ſociety to promiſe, or agree, or

[q] Grot. L. II. C. XIII. § XX.

ſwear,

ſwear, that they will do this or that, which the law expreſſes; no promiſe, or contract, or oath, which is contrary to ſuch laws, can be binding upon them. Notwithſtanding, where they are under an obligation by any of theſe acts, the law of nature and of God requires performance; yet this law requires no performances of what is contained in ſuch promiſes, or contracts, or oaths, as the civil laws have forbidden; becauſe the members of the ſociety are in theſe inſtances incapable of obliging themſelves. They, who are under the authority of another, have no liberty or moral power of binding themſelves to do what this other forbids, or to neglect what he commands. As far therefore as the juriſdiction or authority of the civil legiſlator extends; the ſubjects are incapable of obliging themſelves in oppoſition to his laws. They have indeed the natural power of repeating the words of ſuch promiſes, or contracts, or oaths, as his laws have forbidden. And cuſtom may lead us, or the want of another name may force us, to call the mere repeating of theſe words a promiſe or a contract or an oath. But they, from whom the civil laws have taken the liberty or moral power of acting for themſelves, do nothing by repeating them: the words alone without ſuch liberty or moral power produce no obligation.

This principle, upon which the civil laws make void ſuch promiſes, or contracts, or oaths, as they have antecedently forbidden, may be placed in another light. An antecedent obligation will make void any ſubſequent obligation, which is contrary to it. But the civil law, which forbids the promiſe, or contract, or oath, and conſequently the obligation of this law, is here ſuppoſed to be antecedent to the promiſe, or contract, or oath itſelf

itſelf. The obligation therefore of the civil law will make void the obligation of any of theſe ſubſequent acts. You may perhaps reply, that the obligation of performing our promiſes, or contracts, or oaths, ariſes from the law of nature and of God, and that this law is antecedent to all civil authority whatſoever. But this ſuggeſtion, though it is true, is nothing to the purpoſe. For though the general obligation of performing our promiſes, or contracts, or oaths, is antecedent to all civil authority; it will be no conſequence, that the obligation of this particular promiſe, or contract, or oath, which the civil laws have forbidden, is likewiſe antecedent to all civil authority: unleſs you can ſhew, that the law of nature or of God has required you to make this promiſe, or to engage in this contract, or to take this oath in particular. If you can find any covenant, which the law of God requires you to engage in, ſuch for inſtance as you will probably underſtand the covenant of baptiſm to be; I will allow, that no human authority can make void the obligation, that ariſes from ſuch a covenant by forbidding it. But where the law of nature or of God, whilſt it requires you in general to fulfil your promiſes, contracts, or oaths, has left you at liberty, as to any particular promiſe, contract, or oath, whether will you engage in it or not; there the civil laws can take this liberty from you; if it appears to be inconſiſtent with the common good of the ſociety: and then the obligation of the civil laws, being antecedent to your engaging in ſuch promiſe, contract, or oath, will make it void, if you ſhould engage in it. For by the ſuppoſition of your being at liberty, by the law of nature or of God, to engage or not engage in this particular promiſe, con-

contract, or oath, this law had laid you under no obligation to engage in it, and conſequently had laid you under no obligation to keep it, antecedently to any appointment of civil laws concerning it.

There is rather more difficulty in underſtanding, how the act of the civil legiſlator can ſet the obligation of promiſes, contracts, or oaths, aſide by a ſubſequent act; that is, by forbidding performance, after we have engaged in them; where no antecedent law had forbidden us to engage. [r] Grotius, in explaning this matter, lays it down as a general principle, that wherever an inferiour enters into any obligation, ſuch obligation muſt be a conditional one: an inferiour, he ſays, has no power to bind himſelf without the conſent of his ſuperiour: and upon this account every obligation of an inferiour, if it does not expreſs ſo much, muſt be underſtood to imply, that he conſents to be obliged, provided his ſuperiour agrees to the obligation. But if our author, by making this a neceſſary condition in the promiſe, contract, or oath of an inferiour, means, that no inferiour can be obliged by any ſuch act, unleſs his ſuperiour allows the obligation, either expreſsly by confirming it, or tacitly by not contradicting it; this principle is not univerſally true. This indeed is the ſituation of a ſlave: all his actions are ſubject to the authority of his maſter: no act therefore, which he does, can be valid without the concurrence of his maſter. It is likewiſe the ſituation of children, who have not yet arrived at the uſe of their reaſon: all their actions, during this natural minority, are ſubject to the abſolute control of their parents: they are therefore naturally incapable of binding themſelves; unleſs their parents

[r] Ibid.

agree

agree to the obligation either expreſsly or tacitly. But where the ſuperiority is in its own nature a limited one, and extends only to ſome actions of the inferiour; no concurrence of the ſuperiour, either expreſs or tacit, is neceſſary to make ſuch acts of the inferiour valid, as are not ſubject to his juriſdiction. The moſaic law indeed gave the huſband a power to make void any vow of the wife; or rather it placed the wife in ſuch a ſtate of ſubjection, that no vow of hers could be binding, if the huſband declared, that he diſallowed it. But without ſuch a poſitive law, as this, many acts of a wife are naturally free from the juriſdiction of her huſband; ſo that ſhe is capable of binding herſelf without his concurrence. Now civil ſubjection is in its own nature a limited one: the members of a civil ſociety are ſubject to the legiſlative power of it: but the purpoſes of the ſocial compact, from which this ſubjection ariſes, determine it to extend only to ſuch things, as are neceſſary or conducive to the common ſecurity or benefit of the whole or of its ſeveral parts. In all things, which have no relation to theſe purpoſes, the members of a civil ſociety are free to act for themſelves, and conſequently have a moral power of binding themſelves, without the concurrence of the civil legiſlator. If therefore the promiſe, contract, or oath is not contrary to ſome obligation of the ſocial compact, there is no reaſon for ſuppoſing, either that any concurrence of the civil legiſlator is neceſſary to make the act binding, or that any want of ſuch concurrence would make it void. The civil legiſlator however, though he cannot make the act void by a mere declaration of his not conſenting to it, may produce this effect by forbidding performance. When we are

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under any antecedent obligation, we have no moral power of binding ourſelves to do what is contrary to this obligation. The law forbidding performance is here indeed ſuppoſed to follow the act, which it invalidates. But every member of a civil ſociety is obliged by the ſocial compact to obey all the laws of it, at what time ſoever thoſe laws are made. And conſequently, as we are members of a civil ſociety, all our acts muſt be done, though not under a condition of their being binding, if the civil legiſlator conſents to them, yet under a condition of their being binding, if he does not forbid them; becauſe we have no moral power, or are not at liberty, to bind ourſelves otherwiſe.

The reaſons, upon which this principle is founded, will appear more planely from obſerving what would be the conſequence of ſuppoſing the contrary. If the civil legiſlator could not make void a promiſe, contract, or oath, by means of a law, which is ſubſequent to any of theſe acts; the ſubjects, or members of a civil ſociety, would be able to exempt themſelves from the obligation of all laws whatſoever, beſides thoſe, which are now in being. They might any of them bind themſelves to one another, by promiſe, or contract, or oath, never to obey any future law, which made any alteration in the preſent ſtate of things. Or if they knew beforehand what particular law was likely to be made, they might thus bind themſelves to one another not to obey this particular law. Or in ſhort wherever they had a private benefit in view, however inconſiſtent ſuch benefit might be with the good of the public, yet if it was not forbidden by any law now in being, they might in the ſame manner, bind themſelves to one another never to give up this benefit, or never to obey

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any law, which ſhould reſtrain them in their purſuit of it. And then upon ſuppoſition, that the civil legiſlator cannot make void theſe acts by any ſubſequent law, the ſubjects, who had entered into ſuch engagements, would be diſcharged from the obligation of obeying all laws, which are contrary to theſe engagements: becauſe ſuch laws can bind them no otherwiſe, than by over-ruling the obligation of their promiſe, contract, or oath. If therefore you can find any reaſons to ſatisfy yourſelf, that theſe laws would be binding upon them; the ſame reaſons will ſerve to ſhew you in general, that civil laws can over-rule the obligation of promiſes, contracts, or oaths, as well by a ſubſequent, as by an antecedent act. The reaſon, upon which you would probably ſatisfy yourſelf in this caſe, is, that every member of a civil ſociety has ſubjected himſelf by the ſocial compact to the legiſlative power of ſuch ſociety; and conſequently, whilſt he continues a member, he is not at liberty, or has not a moral power, to do any act with effect, which will exempt him from the authority of this power. But you may obſerve, that this reaſon will likewiſe prove, that the civil legiſlator can by a ſubſequent act ſet aſide the obligation of promiſes, contracts, or oaths in general: becauſe, if any act of this ſort was binding, when the civil law forbids performance, the perſon, whoſe act it is, would be thus far exempted from the authority of the legiſlative power.

You may perhaps find it difficult to reconcile this concluſion with a principle of natural law, which ſays, that no ſubſequent obligation can make void an antecedent one: for ſince the law, which forbids the performance, is, by the ſuppoſition, ſubſequent to the promiſe, contract, or oath; you may from thence be induced to imagine, that the law cannot ſet aſide the

obligation of the antecedent act. Your miſtake here is, that, becauſe the law is ſubſequent to the promiſe, contract, or oath, you ſuppoſe the obligation of the promiſer contracter, or juror to obey ſuch law to be likewiſe ſubſequent to theſe acts. Whereas his obligation to obey the law is antecedent, not only to the making of the law, but likewiſe to the acts, which are ſet aſide by it. He could not indeed be ſpecifically obliged to obey this law, before it was made: but he obliged himſelf in general to obey this and all other laws, whenever they ſhould be made, by becoming a member of the ſociety. For the obligation of all civil laws is founded in the obligation of the ſocial compact: and it is this obligation of the ſocial compact, which takes from him the liberty or moral power of obliging himſelf by any act, which ſhall be contrary, not only to the laws, that are already made, but to thoſe likewiſe, that ſhall be made hereafter. He bound himſelf by the ſocial compact to obey the laws; and this obligation is antecedent to his promiſe, contract, or oath. All that the ſubſequent law does is to apply this general and antecedent obligation to ſome particular inſtance.

As the civil law may thus make void a promiſe, a contract, or an oath, either by an antecedent or by a ſubſequent act, which affects the promiſer, or contracter, or juror, immediately and directly, that is either by forbidding him beforehand to engage in ſuch promiſe, contract, or oath, or by forbidding performance after he has engaged in it; ſo likewiſe the civil law may make a promiſe, or a contract, or an oath void by an act which immediately and directly affects the perſons, to whom he promiſes, with whom he contracts, or for whoſe benefit he ſwears; whilſt it affects him, ſo as to diſcharge his obligation, only remotely and indirectly.

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The manner, in which the law operates to produce this effect, has been already explaned: if we make a promiſe, or a contract, or if we take an oath, by which any perſon acquires a right, and the civil law takes from him the right ſo acquired; this act of the law affects him immediately and directly; but at the ſame time it will remotely and indirectly affect us, and diſcharge our obligation: becauſe where there is no right or claim on the one hand, there can be no obligation on the other.

What obligation to perform a void promiſe contract or oath.

XII. Here it may be aſked, whether the civil law, when it makes void the promiſe or contract or oath of any perſon, diſcharges him from the natural obligation ariſing from ſuch act, or only from the civil obligation; whether he is not obliged in conſcience to performance, by the law of natural juſtice, notwithſtanding he is not liable to be compelled to performance by the civil law? In anſwering this queſtion, it may be proper to conſider, whether his act was made void merely for his own benefit: if it was, and the law, whilſt it offers him this benefit, does not compel him to accept it; he is then underſtood to be at liberty either to perform his promiſe, or contract, or oath, if he pleaſes, or to take the advantage, which the law gives him. Where the civil law has fixed the age of diſcretion at twenty one years, or at any other particular period of life, and makes void a contract of lending money to any perſon, who is under this age; it takes from ſuch minor the liberty or moral power of binding himſelf by this contract; ſo that by making this contract he has done nothing. He cannot therefore be under any natural obligation of ſtrict juſtice to pay it. He might perhaps, at the time of borrowing the money, be arrived at the uſe of reaſon: but till he is arrived at that point

of life, where the civil law, to which he is ſubject, has fixed the age of diſcretion, this law deprives him of the liberty or moral power of obliging himſelf: and ſince this operation of the law is a natural one, he cannot by any act of his own lay himſelf under a natural obligation of ſtrict juſtice: becauſe he wants ſuch liberty or moral power. But as this contract was made void for the benefit of the minor; he is at liberty, when he comes to the age of diſcretion, to refuſe this benefit, and to pay the money, if he pleaſes. From hence ariſes an obligation in conſcience, though, as we have ſeen already, it is no obligation of ſtrict juſtice. For every man of integrity and honour, where he cannot receive a benefit himſelf, without making ſome other perſon loſe what that perſon might reaſonably expect, will think it his duty, though it is a duty of the imperfect ſort, to part with ſuch benefit.

But where the civil law, when it makes a promiſe, or a contract, or an oath void, deſigns to hinder the benefit of the perſon, whoſe act is ſo made void, and by this means to prevent ſome harm to others; he is ſo far from being under any natural obligation, either perfect or imperfect, to perform what he had engaged to do, that performance of it is not a matter of indifference; he is not at liberty to perform it; and is guilty of injuſtice, if he does perform it. To ſuppoſe the contrary is to ſuppoſe, that a member of civil ſociety may be obliged in conſcience to obtain a benefit for himſelf, to which, by the laws of his country, he has no right, or to do ſome harm to others, from which, by the ſame laws, they have a right to be free. If a number of men, who have conſpired together to do what the civil law forbids, bind themſelves to one another for his purpoſe by contract or by oath,

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and the ſame law, which forbids ſuch conſpiracy, makes this contract or oath void; they could be under no obligation in conſcience to perform their engagement: becauſe performance does not conſiſt in giving up a benefit of their own, which they are at liberty to waive, if they pleaſe; it conſiſts in purſuing a benefit of their own, to which they have no right, and in obſtructing a benefit of others, to which theſe others have a right.

The firſt occaſion of the common miſtakes in this matter, is an opinion; that where the civil law makes any act void, it leaves us at liberty to judge for ourſelves, as if we were in a ſtate of nature, whether the law of nature would in the like circumſtances bind us to performance; and that, if we find it would, we are to look upon ourſelves as obliged to performance by natural juſtice. Whereas we ſhould conſider, not what the law of nature would bind us to, in conſequence of a promiſe or contract or oath, if we were in ſtate of nature; but what it binds to, when we are members of a civil ſociety, and under the juriſdiction of its laws; we ſhould conſider, whether the law of nature requires performance, where the civil laws, which are founded in our own conſent, have taken from us the liberty or moral power of binding our ſelves. When a man by ſome previous compact, that falls within the notice of common obſervers, has parted with his right to bind himſelf by a ſecond compact, which is contrary to the former; if he ſhould repeat the words or go through the forms of this ſecond compact, we ſee planely enough, that what he ſo does will ſtand for nothing, or will produce no natural obligation of juſtice. But this is the caſe of every member of a civil ſociety, in reſpect of what is forbidden by the civil laws of it for the common or general good. Theſe laws are founded in the original compact of ſocial union, in which he

made himſelf a party by becoming a member of the ſociety. And though this is a remote compact, which does not fall within the notice of common obſervers, yet it is a compact, and will naturally operate juſt as any other compact would. If the civil laws therefore, which are founded in this compact, have made a mans promiſe or contract or oath void; this act of the civil law as naturally takes from him his right of obliging himſelf to do what is contrary to the law, as if he had more immediately and directly given up his right by ſome private compact of the ſame tenor with the law itſelf. Where the civil law of a ſociety has made void the promiſe, or contract, or oath of any perſon, who is a member of this ſociety, we cannot, conſiſtently with theſe principles, ſuppoſe, that he is as much obliged to performance by the law of nature, as if he had lived in a ſtate of nature: becauſe in a ſtate of nature he might have had a liberty, or moral power, of binding himſelf to do what is contained in ſuch promiſe, contract, or oath; whereas, when he is a member of a civil ſociety, the law of nature conſiders him as already bound by the ſocial compact to comply with the civil laws, and conſequently as having no liberty, or moral power, of doing any act with effect, which thoſe laws make void. You may ſay therefore, if you pleaſe, that where the civil law has made his act void, he is to judge of his obligation by the law of nature. But ſtill I contend, that he is not to judge of it by what the law of nature would dictate in the like caſe, if he was in a ſtate of nature, but by what this law dictates in conſequence of his having already obliged himſelf by the ſocial compact to obey the civil laws of his country.

Another occaſion of the common miſtakes in this matter ariſes from our not attending to the diſtinction

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already mentioned, between what the civil laws permit, where they make the act of any perſon void for his own benefit only, and what they require, where they make it void for the purpoſe of hindering a benefit of his own, which he had in view, and of ſecuring others from ſome harm, which they might ſuffer by his purſuing this benefit. When we find, that the civil law, whilſt it makes void the promiſe or contract or oath of any perſon, merely for his own benefit, permits him to perform what is contained in ſuch promiſe contract or oath, if he chuſes to waive his benefit, and to perform voluntarily, though his act is void, what he might have been compelled to perform, if it had been valid; and eſpecially when we find, that, in theſe circumſtances, men of probity and honour eſteem themſelves to be bound in conſcience to a voluntary performance; we firſt conclude, that this obligation in conſcience muſt be a perfect obligation of natural juſtice; and then we form a more general concluſion, that what we are obliged to do in caſes of this ſort, we are likewiſe obliged to do in all caſes of void acts; even in thoſe, where our acts, inſtead of being made void with a deſign of ſecuring our own benefit, are made void with a deſign of hindering it, and of ſecuring to others ſuch benefit, as the law, which makes our act void, requires us not to deprive them of.

Effect of civil laws on the promiſes &c. of kings who have legiſlative power.

XIII. [r] When Grotius propoſes to enquire, whether kings can make void their own promiſes, or contracts, or oaths in the ſame manner, as they can make void thoſe of their ſubjects; he takes care to inform his readers, that he confines this queſtion to kings, who are intruſted with legiſlative power. And in fact [r] without ſuch a limitation, here would be no queſtion at all: becauſe the acts of private perſons are over-ruled or

[r] L. II. C. XIV.

made void no otherwiſe, than by legiſlative power: and conſequently ſince they, who have not legiſlative power, cannot make void the acts of their ſubjects, they certainly cannot make void their own acts.

In regard to ſuch civil laws, as immediately affect the ſubject, whoſe promiſe, or oath, or contract is made void; they are either antecedent or ſubſequent to ſuch promiſe contract or oath. The firſt queſtion therefore, concerning kings, who have legiſlative power, is, whether by any antecedent law declaring, that all obligations entered into in ſuch circumſtances, or for ſuch purpoſes, as the law deſcribes, ſhall be void, they can make void their own acts, as well as the acts of their ſubjects. Here Grotius diſtinguiſhes between ſuch acts, as they do in their kingly capacity, by which he means their legiſlative capacity, and ſuch as they do in their private capacity. Laws of their own making have no authority over them in their legiſlative capacity: becauſe, if in this capacity they could not act freely, notwithſtanding their own laws, they could not repeal thoſe laws, after they have once made them. But ſince no promiſe, or contract, or oath of any perſon can be made void any otherwiſe, than by the act of a ſuperiour, which takes from him his liberty or moral power of obliging himſelf; the conſequence is, that the law of a king having legiſlative power, ſince he is not his own ſuperiour, when we conſider him in his legiſlative capacity, cannot make void any promiſe, contract, or oath, in which he engages in this capacity. Thus for inſtance, whatever exception there may be to the contract of a ſubject, upon account of the civil minority of the party contracting, that is, upon account of his being of leſs age, than the law requires to make him capable of binding himſelf; yet there is not the ſame exception againſt a

contract

contract of a king, if he has legiſlative power, and makes this contract in his ſovereign capacity for the purpoſes of the ſtate; notwithſtanding he ſhould be under the age, which the civil law has fixed as the limit of minority.

What has been here ſaid proceeds upon a ſuppoſition, that no law has been preſcribed by the ſociety to their king, when he was called and appointed to his office, and was entruſted with legiſlative power. Any laws, which came originally from the legiſlative power of the people, before they lodged the legiſlative power of the ſociety in his hands, are binding upon him as compacts, to which, by accepting the crown under the limitations of theſe laws, he immediately and directly conſented. Upon this account all promiſes or contracts or oaths of ſuch king, if they are contrary to theſe laws will be void. By this compact he has given up his liberty or moral power of binding himſelf to do what theſe fundamental laws forbid: thus far therefore this compact may be conſidered as the act of a ſuperiour; becauſe it is a ſtanding check upon his power.

But though a king having legiſlative power is not his own ſuperiour, in reſpect of ſuch acts, as he does in his legiſlative capacity, and conſequently is not affected in theſe acts by his own laws; yet in reſpect of any other acts of a private nature, that is, of any acts, which he does as a part of the community, he is bound by his own laws. Grotius conſiders this obligation of a king having legiſlative power as an indirect one. Natural equity, or the nature of a civil ſociety, requires, that all the parts of ſuch ſociety ſhould conform themſelves to whatever, in the judgment of the common underſtanding, is for the general good. When therefore

fore the matter of any law, and the reaſon of it, is the ſame, whether it is applyed to the king or to the ſubjects; ſuch law, though it is of his own making, is binding upon himſelf: becauſe, in reſpect of this law, he can only be conſidered as a part of the ſociety; and it is as much for the general good, that he ſhould comply with it, as that any of his ſubjects ſhould comply with it. When he is conſidered in his legiſlative or ſovereign capacity, he is ſuperiour to every part of the ſociety: whatever laws therefore he preſcribes to the ſociety in general, they will affect all the members of it, to whom the matter or the reaſon of the law relates; and conſequently he muſt be underſtood to deſign, that theſe laws ſhould extend to all acts of his own, which are done by him as a part of the community, that is, to all acts of his own, where the matter and the reaſon of the law is the ſame, when applyed to him, as when applyed to any other part of the ſociety. If the legiſlator by any antecedent law of this ſort takes away from the other parts of the ſociety their power of obliging themſelves by an act, which is contrary to ſuch law; he is underſtood by the ſame law to take away his own power, or at leaſt to renounce his own power, of obliging himſelf by a like act. Thus though a king with legiſlative power would be obliged to pay any debts, which he contracted for the public uſe in his ſovereign capacity, during his civil minority; yet his obligation to pay any debts which he contracted upon his own private account, would be void, in the ſame manner with the like obligation of any of his ſubjects; that is, there would be no obligation of ſtrict juſtice, but only an imperfect obligation of honour or of benevolence. In like manner a civil law, which makes marriages void, upon account of ſome de-

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fect in the form of the contract, or of age in the parties, will make void the marriage of the king, though he had the ſole legiſlative power; if he had not taken care expreſsly to except himſelf out of the law.

[1] Grotius obſerves, that if a king having legiſlative power has only an uſufructuary right in the crown; that is, if the people have, by a fundamental law of the conſtitution, reſerved to themſelves the right to diſpoſe of the crown by a new election upon every vacancy, or have, by a like law, determined the future ſucceſſion; he has, whilſt in poſſeſſion, no right to alienate, by promiſe or contract or otherwiſe, any part of the patrimony of the crown. By the patrimony of the crown he means ſuch lands or ſuch revenues, as are annexed to the crown by ſome act of the ſociety, for the ſupport of the goverment or for the public purpoſes of the ſtate. Such uſufructuary kings have no other right in this patrimony, than they have in the crown, to which it is annexed. They have a right to the uſe and profits of it: but in the mean time the property of it is in the ſociety. And ſince all alienations of a thing, which is not the property of the perſon who makes the alienation, are void; any alienation of this patrimony will be void, if it is made by the king alone without the conſent of the ſociety, ſignified either by itſelf or by its repreſentatives.

Our author obſerves farther, that this general rule does not admit of an exception upon account of the ſmall value of the thing, which is alienated. A man has no more right to alienate what is not his own, where the thing is of ſmall value, that where it is of great value. The only difference ariſing from the value of the thing alienated is, that where it is of ſmall

[1] L. II. C. VI. § XI.

value,

value, it is more reaſonable to preſume upon the conſent of the people, from their ſilence or their not oppoſing the alienation, than where it is of great value; becauſe it is more likely, that the people are willing to part with the one, than with the other.

[t] But we are to diſtinguiſh between the patrimony of the crown, and the fruits or profits, which have accrued from that patrimony. For though the preſent poſſeſſor has no property in the patrimony itſelf; yet, ſince the uſe and profits are his, he will have property in ſuch profits as have actually accrued. And thus, whilſt the patrimony itſelf is not alienable without the conſent of the ſociety, ſuch profits will be alienable by his own act. Thus the right to certain cuſtoms, duties, or tolls may be a part of the patrimony: but the money, which has been already received from ſuch cuſtoms, duties, or tolls is the fruit or profit of it. The right to receive and obtain property in confiſcated eſtates may be a part of the patrimony: but eſtates, which have been already confiſcated, are amongſt the profits. But whilſt we ſay, that theſe profits are alienable; we ſhould remember, that even in kingdoms, where the king has legiſlative power, ſuch alienations may be prevented by fundamental laws; and in other kingdoms they may be prevented by laws, which are made by the legiſlative body.

[u] There is one contract, which Grotius ſays will be valid, notwithſtanding the king has only an uſufructuary right in the patrimony of the crown; though it is a contract, which ſeems to diſpoſe of this patrimony. A mortgage of ſuch patrimony, to raiſe money for the ſervice of the ſtate, will be ſo far binding, that the ſociety will be obliged to redeem it. But then he

[t] Ibid. §XII. [u] Ibid. §XIII.

rightly

rightly adds, that this contract produces such an effect only in those kingdoms, where the king alone has a constitutional right to tax the people for the public service. In such kingdoms the society, as it is obliged to pay those taxes, which are laid upon it by the king, for the necessary purposes of government, will be obliged likewise to redeem the patrimony of the crown, when he has mortgaged it for these purposes: because such a redemption is in effect only the payment of such taxes. But this reason is planely not applicable, where the king has no power to lay any taxes upon the subjects, besides what are proposed and consented to by themselves or their representatives. And consequently, in such mixed constitutions of government, as he has no right to alienate the patrimony of the crown, so neither has he any right to mortgage it, by his own act.

* Though a king with legislative power can, as we have seen, set aside the promises, contracts, or oaths of his subjects by a subsequent law forbidding performance; yet he cannot make his own acts void in the same manner: because this power, in respect of his subjects, arises from a principle, which cannot be applyed to himself. A subject, as far as the ends of entering into civil society extend, has no moral power of obliging himself, but under a condition, either express or tacit, that performance shall not be afterwards forbidden by the civil legislator. But this condition cannot be supposed to be contained in the promise, contract, or oath of a king having legislative power: because he is not under the authority of any such legislator. His acts therefore, when he has once engaged in them, if they were not invalid from the beginning,

* Grot. L. II. C. XIV. § III.

must

muſt ſtand good; as far as they are conſiſtent with the law of nature, and the compact, by which he holds his power. We have indeed diſtinguiſhed above between the private and the legiſlative or ſovereign capacity of ſuch a king. But this diſtinction is of no uſe here: for the condition, which is the ground of the invalidity of promiſes, contracts, or oaths, when they are once engaged in conſiſtently with the laws then in being, can be no otherwiſe made intelligible, than by ſuppoſing the promiſer, contracter, or juror, and the ſuperiour, who forbids performance, to be different perſons: two different characters of one and the ſame perſon will not be ſufficient to reconcile this condition with common ſenſe. If we ſuppoſe the ſame perſon, acting in different characters, to have a power of undoing in his legiſlative character what he has done in his private character; his promiſe, contract, or oath with the tacit condition, in conſequence of which it is ſuppoſed liable to be rendered invalid by ſome ſubſequent act of his own, will be to this effect — I conſent in my private capacity to be obliged, if I conſent hereafter in my legiſlative capacity; which amounts only to ſaying, that I now conſent to be obliged, if I conſent hereafter.

But a civil legiſlator can releaſe the members of the ſociety from their promiſes, contracts, or oaths, not only by a direct act, which affects them immediately, but likewiſe by an act, which in reſpect of them is an indirect one, as it immediately affects the perſons, to whom they are obliged, and affects them only remotely. This act of the legiſlator conſiſts in taking away the claim, which ariſes from the promiſe, contract, or oath. It may therefore be aſked, whether a king with legiſlative power cannot releaſe himſelf by a like indirect act from

from his own promiſes, contracts, or oaths; that is, whether he cannot by a law of his own making deprive the ſubjects of any claims, which they have acquired by his conſent. Grotius replys to this queſtion, that a king, with legiſlative power, has no right, by virtue of ſuch power, to deprive his ſubjects of their claims; whether they are claims upon himſelf or upon one another; unleſs for the purpoſe of puniſhing thoſe, who have deſerved it, or for ſome other purpoſe of public utility. And if, for any ſuch purpoſe of public utility, he deprives any particular ſubjects of their claims; he is to take care, that the ſociety ſhould contribute towards making them amends: becauſe, by the ſocial compact, the obligation of advancing the public utility reſts equally upon all; and conſequently the burden of advancing it cannot juſtly be thrown upon any one or upon a few. The maſter of a ſlave may, by the right of private deſpotiſm, deprive him of ſuch claims, as are contrary to his own benefit: becauſe the end of this right is the private benefit of the maſter. But a king, whoſe power is as abſolute, as the nature of civil power will admit it to be, has no ſuch right: for though we ſpeak of legiſlative power, when it is veſted in one ſingle perſon, as if it was abſolute power, we only mean, that it is ſubject to no inſtituted or external reſtraints. It cannot be abſolute in the full ſenſe of the word, ſo as to mean a power of doing whatever the perſon, in whom it is veſted, has a mind to do: becauſe it is in its own nature a limitedpower; it is only a power of governing a civil ſociety, that is, of directing ſuch a ſociety and all its members to what is for the general good, and of ſecuring them in the enjoyment of all their rights, which are conſiſtent with this general good. Whatever therefore a king with legiſlative

power

power might be inclined to do, and whatever, with the help of executive power joyned to legiſlative, he might in fact be able to do; yet certainly a power of directing a civil ſociety and all its members to what is for the general good, and of ſecuring them in the enjoyment of all their rights, which are conſiſtent with this general good, can never give him a right to deprive them of any claims, which they have acquired by his promiſes, contracts, or oaths; unleſs where theſe claims are inconſiſtent with the ends of civil ſociety.

Effect of civil laws on marriage.

XIV. The law of God concerning marriage, whether we collect this law from the principles of right reaſon, or from his revealed word, has made this contract ſomething different from others. It may therefore be proper to conſider it ſeparately; in order to determine, how far the civil law can make it void, either for want of age in the parties, or for want of ſome particular ceremonies either preceding or attending the contract itſelf. Moſt of the queſtions, that ariſe upon this head, will be eaſily reſolved, upon the ſame principles with theſe two, which follow. Firſt; it is a queſtion; whether the civil law is conſiſtent with the law of nature and of God; if it fixes the age of conſent for marriage at twenty one years, or at any other particular period of life, and enacts, that all marriages, which are ſolemnized without conſent of parents or guardians, where both or either of the parties are under this age, ſhall be nullities from the beginning, or ſhall be void to all intents and purpoſes whatſoever. And ſecondly; it is a queſtion, whether the civil law is conſiſtent with the law of nature and of God; if it enacts in like manner, that all marriages ſhall be nullities, or be void from the beginning, to all intents and purpoſes whatſoever; unleſs previous notice is given, that ſuch marriages are intended

tended to be ſolemnized, and unleſs they are ſolemnized in a church or in ſome other particular place, which the law appoints. The ſame principles, that are to be made uſe of for reſolving theſe two queſtions, will, if they are rightly underſtood, be equally applicable to all other queſtions of the like ſort.

Our religious notion of marriage is contained in what Chriſt has declared concerning it. He has taught us, that, when a man and a woman are bound to each other as huſband and wife, they are to be deemed as inſeparable, as if they were one fleſh; that this was the original intention and appointment of God; and conſequently that they, who are thus joyned together by his authority, cannot be put aſunder by the authority of man. Our notions of marriage, as we collect them from Gods natural law, are of much the ſame ſort. This then being the law of God concerning marriage, we are to enquire, whether the civil law is inconſiſtent with it, when it enacts, that any marriages ſhall be void to all intents and purpoſes whatſoever, for want of ſome circumſtances, which this law requires.

We have ſuppoſed the civil law to ſay, that all marriages ſhall be void, where both or either of the parties are under the age of twenty one years, if they are ſolemnized without the conſent of the parents or guardians of the party ſo under age. Now a ſmall alteration in the words of ſuch a civil law would make it ſpeak the language of the law of nature. [x] All marriages are void by the law of nature, if they are ſolemnized without conſent of parents; where both or either of the parties are too young to be capable of judging and chuſing for themſelves. Till we arrive at the full uſe

[x] See B. I. C. XV. § XIII.

of our reaſon, nature places us under the authority of our parents, if they are living; and either by their act, or by the act of the law, our guardians ſucceed into their place, if they are dead. In this period of life, as we have no underſtanding of our own to judge, and no will of our own to chuſe, what is beſt for us to do, it is the duty of our parents to take care of us, and to contrive for our benefit: and this duty gives them a natural right to judge and to chuſe for us. A male or a female, though they are under the age of diſcretion, may indeed be able to ſpeak ſuch words, or to act over ſuch ceremonies, as cuſtom has made expreſſive of conſent to a bargain of cohabitation for the purpoſes of marriage. But ſince they are then under the authority of their parents, they have no moral power of acting for themſelves, or no liberty of giving conſent without the concurrence of their parents. Theſe words therefore and theſe ceremonies will ſtand for nothing; they will be attended with no moral effect, that is, they will produce no obligation. We may, if we pleaſe, give the name of marriage to what they have done, or rather to what they have attempted to do, by repeating ſuch words, and by acting over ſuch ceremonies. But if both the parties are too young to judge and to chuſe for themſelves, it will be a void marriage: becauſe neither of them are capable of binding themſelves to the other, as huſband or wife, by their own act. Or if only one of them is under ſuch incapacity, this will be ſufficient to make the marriage void: becauſe it is a well-known rule in contracts, of the matrimonial as well as of any other ſort, that there is no obligation upon either party, unleſs there is a mutual obligation upon both.

Theſe are undoubted principles of the law of nature: and we no where find any poſitive law of God, which has

as changed or over-ruled them. He has no where njoyned, that, notwithſtanding a male or a female re naturally incapable of binding themſelves by any ther contract without the conſent of their parents, hilſt they are under the age of diſcretion, they ſhall e deemed capable of binding themſelves by a matri- nonial contract. His revealed law does indeed ſay, and is natural law ſpeaks to the ſame purpoſe, that, when a an and a woman are become huſband and wife, they re as inſeparable, as if they were only one fleſh. But his law is nothing to the purpoſe in the queſtion, hich is now before us. We are not enquiring, whether man and a woman can be ſeparated from one another, onſiſtently with the law of God, after they are become uſband and wife; but whether there is any law of od, which has impowered a male and a female, whilſt ey are under the age of diſcretion, to make them- lves huſband and wife by their own act without the oncurrence of their parents. It is granted, that the arriage contract is in its own nature perpetual and in- iſſoluble, that they, who are joyned together by the uthority of God, cannot be put aſunder by the au- hority of men. But it is not inconſiſtent with this otion of marriage to put a male and a female aſunder, ho come together under a natural incapacity of bind- g themſelves to one another by a marriage contract: ecauſe it does not appear, that in theſe circumſtances ey are joyned together by the authority of God. hough they make a bargain, or rather attempt to ake a bargain, of cohabitation for the purpoſes of arriage in any words or according to any form what- ever; we know, that Gods natural law declares ſuch argain to be a nullity; and no poſitive law of God

can be produced, which ſays the contrary. Thus far therefore the civil law would agree with our natural notions of the marriage contract, and would not contradict our religious notions; if it was only to enact, that all marriages ſhall be void, which are ſolemnized without conſent of parents, where both or either of the parties are under the age of diſcretion.

But we have ſuppoſed the civil law to enact, that all ſuch marriages ſhall be void, where both or either of the parties are under the age of twenty one years, or ſome other particular period of life, which the ſame law fixes as the age of diſcretion. The only point, which remains to be conſidered in this change of the queſtion, is, whether twenty one years of age can be fixed by the civil law as the age of diſcretion, conſiſtently with the law of God: and this ſeems to be a point, which can ſcarce admit of any doubt. No law of God either poſitive or natural has fixed the preciſe age, at which all perſons ſhall be deemed capable of acting for themſelves, and be exempted from the authority of their parents. We are then capable of acting for ourſelves, and are conſequently then exempted from the authority of our parents, when we come to the full uſe of our reaſon. But ſince this may happen at different times of life to different perſons, in different countries, or even in the ſame country, the civil legiſlator of any community is at liberty to fix that period of life, as the age of diſcretion, at which experience and obſervation have ſhewn the judgment of thoſe, who live in the ſame climate with himſelf, to be uſually ripe.

Upon theſe principles the civil laws of our own country have long determined twenty one years to be the age of conſent for other contracts; and the

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ecclesiastical canons have long considered all persons, till they are arrived at this age, as under the authority of their parents or guardians, in respect of the matrimonial contract. We may easily guess what principle our civil law proceeded upon, when it fixed the age of consent in matrimonial contracts lower than this, at twelve years for the woman and at fourteen for the man. Perhaps these ages might have been well enough fixed, if marriage had been ordained for no other end, besides the production of children, or for no other end, besides what might have been obtained without any understanding or judgment in the parties concerned. But we are taught, that it was ordained, as well for the careful education, as for the production, of children; as well for advancing the domestic happiness of the parties, as for satisfying their appetites in a regular manner, if they have not the gift of continence. And whatever other purpose of marriage a woman at twelve or a man at fourteen years of age may be supposed capable of answering; they are certainly not capable of answering these. The education of children, and the domestic comfort, which the husband and wife ought to have of each other, require more prudence, than is commonly to be met with at these respective ages. There seems indeed to be a sort of contradiction in the civil law of any country, if it allows a male and a female to be capable of binding themselves by a contract, in which they undertake the duty of educating children, at a time of life, when it considers them in other respects as children themselves; if it allows them to dispose of their own persons for ever, at their own discretion, by contract, upon which they stake their future ease and

happineſs, at a time of life, when it conſiders them as having too little diſcretion to be truſted with the diſpoſal of five ſhillings without advice and direction.

There can be no poſſible grounds for imagining, that either the nature of the marriage contract, or any poſitive law of God concerning this contract, has reſtrained the civil legiſlator from confining the civil advantages of marriage to thoſe marriages only, which are ſolemnized in ſuch places and according to ſuch forms, as he preſcribes for the general good. The huſbands claim to the wifes perſonal eſtate, the wifes claim to dower, and ſome other claims of the like ſort, are civil advantages of marriage, or advantages, which the civil law annexes to this contract. Among theſe we may likewiſe reckon the civil legitimacy of the children, that is, their claim to inherit or to tranſmit either honours or property in inteſtate ſucceſſion. Such effects of marriage, as theſe were introduced at firſt, and are ſupported afterwards only by civil laws, and not by any law of nature, or by any divine law of poſitive inſtitution. And the ſame law, or rather the ſame legiſlative power, by which theſe claims were created, has an unqueſtionable right to regulate and to limit them. If therefore the civil law was only to ſay, that ſuch marriages, as are ſolemnized without any previous notice, and ſuch likewiſe as are not ſolemnized in a church, or ſome other particular place, which the law appoints, ſhall be void to all civil intents and purpoſes; there could be little reaſon to doubt of its conſiſtency with the natural and the revealed law of God.

But we have ſuppoſed the civil law to go farther, and to enact, that ſuch marriages ſhall be void, not only as to all civil intents and purpoſes, but as to all intents and

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purpoſes whatſoever; by which we muſt underſtand the legiſlator to mean, that they ſhall give neither of the parties a right to the perſon of the other, nor be attended with any obligation on either ſide. Here the old queſtion will return, whether a contract, which in its own nature is perpetual, can be diſſolved by the civil law? whether they, who are joyned together by God, can be put aſunder by man? We cannot indeed deny the truth of the principle, upon which this queſtion proceeds: but we may well maintain, that it is not applicable to the point in debate. The principle, upon which it proceeds, is planely this; —When a male and a female are become huſband and wife; the law of nature declares, that the contract, which made them ſuch, is perpetual; and the revealed law of God ſpeaks the ſame language, and declares, that no human authority can put them aſunder. The point in debate is; —Whether the civil law can take from a male and a female the power of binding themſelves to each other as huſband and wife, by a matrimonial contract, according to any form, or in any place, that they pleaſe. The queſtion therefore ariſing out of this principle, as far it is applicable to the point in debate, ought not to be; —Whether the civil law can diſſolve a contract, which the law of nature has made perpetual; or whether they, who are joyned together by God, can be put aſunder by man? but; —Whether a male and a female can make any matrimonial contract at all, or bind themſelves to each other as huſband and wife; if, they proceed in ſuch a manner, as the civil law has forbidden, and declared not to be binding. For if, when they have proceeded in ſuch a manner, there is no contract, and the two parties are not huſband and wife; it does not appear, that they

are joyned together by God: and conſequently, as our natural and religious notions of marriage would allow them to be put aſunder, ſo our common notions of decency will inform us, that they ought not to come together.

In the liberty of nature, if a ſingle man and a ſingle woman of full age were to make a bargain of cohabitation for the purpoſes of marriage, either in a church or in any other place, either in the words and according to the forms, which are preſcribed in our book of common prayer, or in any other words, and according to any other forms of their own chuſing, which ſufficiently expreſs their free and mutual conſent; ſuch a bargain would be a good and a valid marriage; the two parties would be bound to each other as huſband and wife; and when they are ſo bound, the law of God, as we either collect it from reaſon, or read it in his revealed word, has made the obligation perpetual. But when the man and the woman are conſidered as members of a civil ſociety; we ſhould obſerve, that the act of joyning themſelves to ſuch ſociety implys, that they agree to ſubmit their rights or moral powers of acting at their own diſcretion, and amongſt the reſt their right of marrying according to what form and in what place they pleaſe, to be regulated and limited by the common underſtanding of the ſociety, either for the public good of the whole body, or for the general good of its ſeveral parts. For though the law of God has eſtabliſhed the perpetuity of the marriage-contract, and has by this means deprived the man and the woman of their liberty of parting from one another, after they are become huſband and wife; yet it has not preſcribed any particular place or any parti-

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cular form for making this contract: ſo that the right of marrying in what place and according to what form they pleaſe, as it conſiſts in a full liberty, is alienable in its own nature, and is actually given up by the ſocial compact, as far as the common underſtanding of the ſociety ſhall find it to be neceſſary or conducive to the general good to reſtrain this liberty. Whenever therefore the laws of their country preſcribe, that all marriages ſhall be ſolemnized in ſome particular place and according to ſome particular form, and enact, that no marriage ſolemnized in any other place or according to any other form ſhall be binding; the effect of ſuch laws will be, that the man and the woman will have no right, or no liberty, or no moral power, of conſenting to a marriage-contract any otherwiſe, than as the laws direct. If they make, or rather attempt to make, a bargain of cohabitation for the purpoſes of marriage, in any other place or according to any other form; we may call this attempt a ſolemnization of marriage, for want of a better name for it: but in the mean time the bargain will not be binding upon either party; and what we call a marriage will be a mere nullity, upon the principles of the law of nature. For it is a known principle of the law of nature, that no perſon can be bound by any act, where he has no right, or liberty, or moral power of binding himſelf, that no words or ceremonies, however cuſtom may have made them expreſſive of conſent, can produce any obligation, where the perſon, who makes uſe of theſe words or ceremonies, has not the liberty of conſenting. A man and a woman may repeat ſuch words, or go through ſuch ceremonies, as are expreſſive of their conſenting to a bargain of cohabitation for the purpoſes of marriage; but

but no obligation will ariſe from the words or ceremonies themſelves; where the parties had no moral power of conſenting. If they had an intention of binding themſelves to each other as huſband and wife; this indeed implys the conſent of their minds: and conſequently the words and ceremonies are in one reſpect not mere ſounds and empty forms; becauſe they are deſigned by the parties, who uſe them, to expreſs this conſent of mind. But if they had no liberty of conſenting, then in reſpect of any effect or obligation, which might be ſuppoſed to ariſe from this act, they will be mere ſounds and empty forms; they may expreſs the conſent of the parties, but it is ſuch a conſent, as produces no obligation. For the marriage contract is thus far like all other contracts: the natural power or intention of conſenting does not make us capable of binding ourſelves by this or by any other contract: we are no otherwiſe capable of binding ourſelves, than by having a moral power, that is, a right or liberty of conſenting. We allow therefore, that, when a man and a woman are bound to each other as huſband and wife, the law of God forbids us to put them aſunder; we allow, that, when a bargain of cohabitation for the purpoſes of marriage produces any obligation, the law of God makes this obligation perpetual. But in the mean time we affirm the effect of ſuch a civil law, as we have been deſcribing, to be, that, when a marriage is ſolemnized otherwiſe than the law requires, the parties are not bound to each other as huſband and wife, the bargain, which they have made in words, is no bargain at all, and produces no obligation.

In ſhort when we are examining either theſe or any other queſtions, which relate to the power of the civil law

law to annull a marriage once ſolemnized, we are apt to miſlead ourſelves by not taking the matter up high enough. By ſolemnizing a marriage we only mean, that a man and a woman have repeated ſuch words or gone through ſuch ceremonies, as cuſtom or law has made expreſſive of a bargain of cohabitation for the purpoſes of marriage. When they have done this, we ſuppoſe them to be bound to each other as huſband and wife, without enquiring, whether they were capable of ſo binding themſelves or not. And then upon this ſuppoſition, in which we take the very point in queſtion for granted, we readily conclude, that they are joyned together by God, and conſequently that they cannot be put aſunder by man. But inſtead of conſidering the effects of a good and a valid marriage, we ſhould here conſider, whether the marriage is a good and a valid one. If the male and the female are under the age of diſcretion, and are therefore ſubject to the authority of their parents; or if they are members of a civil ſociety, and are therefore ſubject to the laws of their country; or if upon any other account they have no liberty or no moral power of conſenting; ſuch words or ſuch ceremonies, as are expreſſive of conſent, and in other circumſtances would have produced a good and a valid marriage, will, in theſe circumſtances, ſtand for nothing or have no meaning, and will produce no obligation. The male and the female therefore, by repeating thoſe words and by going through thoſe ceremonies, though this act, for want of a better name, is called ſolemnizing a marriage, will not have bound themſelves to each other as huſband and wife. But if they are not huſband and wife, our natural or our religious notion of marriage is out

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of the queſtion: if there is no contract at all, there cannot be any perpetual contract; if they are not joyned together at all, they cannot be joyned together by God; and conſequently we can have no grounds for concluding, that they cannot be put aſunder by man.

When a marriage is thus, to all intents and purpoſes whatſoever, made a nullity from the beginning by the act of the civil law; there can be no obligation of natural juſtice upon the parties to abide by the contract and to cohabit as huſband and wife. For if they have no right or moral power of conſenting, they cannot lay themſelves under any obligation of juſtice. And we have ſeen already that the civil law produces its effect, or makes the marriage a nullity, by taking from them their right or moral power of conſenting. Indeed where the civil law only makes a marriage ineffectual for obtaining certain civil purpoſes, upon account of its wanting ſome forms preſcribed by ſuch law, but allows the validity of it as to other purpoſes; the parties are obliged in natural juſtice to cohabit, and their bargain of cohabitation is naturally a good marriage: becauſe though, by a marriage contract, which wants thoſe forms, they are incapable of obtaining the advantage annexed by the civil law to other marriages, in which thoſe forms are obſerved; yet the ſame law, by allowing the validity of their marriage in other reſpects, leaves them at liberty to bind themſelves to one another as huſband and wife. But where the civil law of any ſociety enacts that a marriage, for want of age in the parties or of certain forms in the contract, ſhall be void to all intents and purpoſes whatſoever; it does not allow the validity of ſuch marriage in any reſpect, but renders the parties,

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who contract otherwiſe, than the law allows, incapable of ſo binding themſelves to one another. And though this incapacity ariſes immediately from the civil law, yet ſince it ariſes ultimately from their own conſent, as they are members of the ſociety, it may properly be conſidered as an incapacity by the law of nature.

Some contracts, which the civil law makes void, are underſtood to oblige in conſcience, though not in ſtrict juſtice; they produce an obligation to performance, though it is not a perfect obligation. But this obligation takes place only in ſuch contracts, as the civil law makes void for the benefit of one of the parties, and leaves him at liberty, if he pleaſes, to waive this benefit. It can not therefore take place in void marriages: becauſe the civil law makes them void in order to hinder the parties from obtaining any benefit by them, and by this means to ſecure ſome benefit to others, in particular to the parents of one or both the parties, who might be made unhappy by an improper marriage of their children. This circumſtance alone is ſufficient to diſtinguiſh the caſe of a marriage, which the civil law makes void, from the caſe of a debt, which it makes void. But there is another very material circumſtance, which puts a farther diſtinction between theſe two caſes, and ſhews us, that, notwithſtanding any obligation of the imperfect ſort to pay a void debt, yet there is not the like obligation to cohabit upon a void marriage. What is contained in a contract of borrowing money might be performed by the borrower, though there was no contract at all. He might, if he pleaſed, give the lender the ſame ſum of money, that he has borrowed, whether he had ever borrowed it or not. And conſequently though the contract is a nulli-

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ty, there is nothing vicious in the performance, merely for want of a contract. Whereas, what is contained in a marriage contract is unlawful, when there is no contract: for cohabitation without a marriage contract is naturally vicious. Unleſs therefore we will maintain, that where a man and a woman are incapable of binding themſelves to one another, as huſband and wife, by a marriage contract, they are capable of binding themſelves in conſcience to do what is vicious, we muſt neceſſarily allow, that they can be under no obligation to cohabit, as if they were huſband and wife, upon a marriage, which the civil law has made void to all intents and purpoſes whatſoever.

The law of God concerning marriage produces its proper effect, not by making all perſons, of any age or in any circumſtances, capable of contracting a good and valid marriage, but by making all marriages perpetual or indiſſoluble, which have once been contracted by perſons, who are of ſuch age and in ſuch circumſtances, as to have the liberty or right of binding themſelves by a marriage contract.

Civil laws ſet aſide other contracts two ways, either by enjoyning beforehand, that they ſhall not be made ſo as to obtain any effect; or elſe by enjoyning afterwards, that they ſhall not be performed. No law of God either natural or poſitive has reſtrained the civil legiſlator from ſetting marriages aſide in the former of theſe ways, by enjoyning beforehand, that they ſhall not be ſolemnized with effect, or ſo as to bind the parties, in any other manner, than what the civil law preſcribes. What the law of God enjoyns is, that a marriage, which is ſolemnized in ſuch a manner as to be once binding upon the parties, ſhall be of perpetual ob-

obligation. I do not ſay, that the law of God enjoyns this merely concerning a marriage, which is once ſolemnized. For ſolemnizing a marriage is an expreſſion, which is uſed in two ſenſes. Sometimes when we ſay, that a marriage is ſolemnized between a man and a woman, we only mean, that they have repeated ſuch words, or gone through ſuch ceremonies, as are expreſſive of a bargain of cohabitation for the purpoſes of marriage; whether any obligation ariſes from what they have done or not. Thus if a man, whoſe wife is living and undivorced from him, ſhould repeat ſuch words and go through ſuch ceremonies with a ſecond woman; we ſhould ſay, that a marriage had been ſolemnized between the man and this ſecond woman; though in the mean time we know, that no obligation of marriage ariſes from this act. But ſometimes, when we ſpeak of ſolemnizing a marriage, we uſe this expreſſion in a ſtricter ſenſe, and mean ſolemnizing it with effect, ſo that the man and the woman by what they have done are become huſband and wife. If we have been brought up from our infancy in a country, where the civil law has allowed almoſt all marriages to be binding, provided certain words and certain ceremonies have been made uſe of; it is no wonder, if we ſhould be led to think, that what we have long found to be the ſame thing in fact, is likewiſe the ſame thing in right; that ſolemnizing a marriage in one of theſe ſenſes is ſolemnizing it in the other ſenſe, that repeating theſe words and going through theſe ceremonies neceſſarily produces an obligation, and conſequently, that to ſet aſide a marriage once ſolemnized, is the ſame thing as to ſet aſide a marriage, which has been ſo

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ſolemnized as to be once binding. But by attending to this diſtinction we may be enabled to ſee, what effect the law of God concerning marriage does not produce, and what effect it does produce. This law does not make all marriages binding, which have once been ſolemnized; it only makes all marriages perpetual, which have been ſolemnized in ſuch a manner, as to be once binding. It does not make all words that expreſs a marriage contract operate like a charm and bind the conſcience, whenever they paſs through the mouth; nor does it give thoſe, who repeat ſuch words, a liberty or moral power of conſenting, in conſequence of their being willing to be man and wife, that is, of their having a natural power of conſenting; it only takes from mankind all right or authority to ſeparate thoſe, who being at liberty to conſent, that is, who being under no reſtraint, either from the law of God or of man, which might take away their moral power of conſenting, have bound themſelves to each other as huſband and wife by a valid bargain of cohabitation for the purpoſes of marriage. The civil legiſlator therefore has the ſame authority to make marriages void from the beginning, that he has to make any other contract void, by ſome antecedent law, which takes from the parties their liberty of conſenting, or renders them incapable of conſenting with any effect.

The only difference between the marriage contract and other contracts is; that other contracts, though they are valid from the beginning, may be reſcinded or made void afterwards by ſome ſubſequent civil law, which forbids performance: whereas, when a marriage is ſolemnized in ſuch a manner, as to be once binding, no ſubſequent civil law can reſcind it afterwards

wards by forbidding performance, consistently with the natural and revealed law of God, which has made this contract perpetual. When civil laws rescind other contracts by a subsequent act of the legislator forbidding performance, they produce this effect, consistently with the law of nature, by means of a condition, which is included in the obligation of every member of a civil society. This condition is, that he consents to be obliged by his contract, if the civil law does not forbid performance. The social compact, in which, as a member of the society, he is a party, makes such a condition natural: because by this compact he obliged himself to submit all his alienable rights to whatever restraints and regulations the common understanding should judge to be necessary for the general good. He cannot therefore, whilst he is under this obligation, that is, whilst he continues in the society, lay himself under any other obligation, which does not include this as a necessary condition. If our right, in respect of the marriage contract, was a right of full liberty; if we were originally free to chuse for ourselves, whether we would make this contract temporary and precarious, or perpetual and constant; this right amongst others of the same sort would be alienable; the social compact would subject it to the civil power; and as members of a civil society we could only bind ourselves in marriage by a perpetual contract, upon condition that the civil law should nor rescind it, after it is made. But our right in respect of the marriage contract is not a right of full liberty; the law of God has not left us free, when we bind ourselves by this contract, to make it either temporary and precarious, or perpetual and constant; we are at liberty on the one hand to bind ourselves by a

perpetual contract, or not to bind ourſelves at all; but if we chuſe to make ourſelves parties in this contract, we are not at liberty on the other hand, but are obliged by the law of God, to make it a perpetual one. We cannot therefore oblige ourſelves to the contrary by the ſocial compact; and conſequently, when we conſent to a marriage-contract, we cannot be underſtood to conſent, that it ſhall be perpetual, upon condition of its not being reſcinded afterwards. This condition takes place only in reſpect of ſuch rights to bind ourſelves, as are ſubjected to the civil legiſlator by the ſocial compact: whereas the right to bind ourſelves by a perpetual marriage-contract, if we bind ourſelves by any marriage-contract at all, could not be thus ſubjected to the civil legiſlator, conſiſtently with our obligation to obey the law of God.

Civil laws are written or unwritten.

XV. We commonly diſtinguiſh civil laws into written and unwritten: but we ſeldom form ſuch preciſe notions of each, as will keep up the diſtinction, and ſhew us wherein the difference between them conſiſts. Every rule of action, which is enjoyned by a civil legiſlator and committed to writing, does not immediately become a written civil law. Such laws, as are eſtabliſhed by long and uninterrupted uſage or cuſtom, may certainly be committed to writing, as well as any other: but this does not change them from unwritten into written laws. Every precept of unwritten law may be expreſſed in words: and whatever can be expreſſed in words may certainly be written down: and when any precept of unwritten law is thus written down, it will be as much a law, as it was before, and may be called a law in writing, if you pleaſe: but if you call it a written law; you will give it an improper name. We muſt

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therefore look for ſome other definition of a written law, beſides the common one, which only ſays, that it is a law committed to writing. No rule of action, though it is preſcribed by a civil legiſlator, and is committed to writing, can be called a written civil law; unleſs the writing contains all, that is eſſential to a civil law. Now the eſſence of a civil law conſiſts in its being being a rule of action preſcribed by the authority of a civil legiſlator. If therefore the writing only contains the rule, which the civil legiſlator preſcribed, but does not contain the evidence of its having been preſcribed by his authority; that is, if ſuch writing is not authenticated by him; it will not contain all, that is eſſential to a civil law, and conſequently it can only be called a law in writing, but will be no written law. But by defining a written law to be a rule of action, which is preſcribed in writing by a civil legiſlator, or which is preſcribed by the authority of a civil legiſlator and is committed to writing by the ſame authority, we ſhall diſtinguiſh it from all thoſe rules of action, which are preſcribed by the authority of a civil legiſlator any otherwiſe, than in writing; though they ſhould afterwards be committed to writing by ſome one elſe, who has not the ſame authority.

When civil legiſlators are profeſſedly employed in making laws; inſtead of truſting their acts to the precarious cuſtody of unwritten tradition, they uſually record what they have done in writing; that ſo the ſeveral members of the ſociety, who are concerned in the laws of it, may know both where to find them and what they are. Unwritten laws therefore either were not made at firſt by a civil legiſlator profeſſedly employed in the buſineſs of legiſlation, but have ariſen out of

immemorial and uninterrupted uſage and cuſtom; or elſe, if they were made at firſt by a civil legiſlator profeſſedly employed in this buſineſs, the evidence of their having been ſo made is loſt, and they have only the authority of the like uſage and cuſtom to ſupport them.

Unwritten laws how eſtabliſhed.

XVI. Whatever uſage has obtained, in any civil ſociety, for time [y] immemorial without being interrupted, may be preſumed to be agreeable to the ſenſe of ſuch ſociety, and to have obtained with its conſent: becauſe the uſage muſt in ſo long a time have come to the knowledge of the public; and if the ſociety had not conſented to it, there muſt have been frequent opportunities either of interrupting it in fact or of declaring a diſlike of it in words. But whatever is conſented to by a civil ſociety becomes a law of ſuch ſociety: and conſequently any uſage, which has obtained for time immemorial is eſtabliſhed in to a law by preſcription. The particular conſent of each member of the ſociety is not neceſſary for the purpoſe of eſtabliſhing any uſage, or the rules ariſing out of any uſage, into laws. For the general conſent of the ſociety binds each of its members: and any rules, which ariſe out of ſuch uſage, as has continued for time immemorial without being interrupted by any act of the public, become laws to all, whom the ſociety intended to include within thoſe rules. Unwritten laws will eſtabliſh themſelves in the ſame manner not only in a perfect democracy, where the legiſlative power is in the hands of the whole collective body of the ſociety, but under ſuch forms of government likewiſe, as commit this power to ſome particular legiſlative body. The ſtanding legiſlator of a civil ſociety,

[y] See B. I. C. VIII. §I. V. VIII.

he does not conſent to any uſage, which generally obtains amongſt the members of ſuch ſociety, might at any time interrupt or ſtop it by forbidding it. If therefore it has continued long enough to be notorious, and is not interrupted by any act of his; he may be preſumed to conſent to it: and this concurrence of the legiſlator thus collected will be ſufficient to give it the force of a law.

But though the conſent of a civil ſociety, or of its legiſlative body collected from long and uninterrupted uſage, eſtabliſhes ſuch uſage into a general law; yet a law ſo eſtabliſhed admits of exceptions. It binds only thoſe, whom the ſociety intended to bind by it: for no poſitive law extends farther, than the intention of the legiſlator: and conſequently if any particular cuſtoms, different from the general uſage, have obtained without interruption, for time immemorial, in reſpect of particular perſons, or places, or things, theſe cuſtoms will be exceptions to the general law, and will themſelves be the laws of thoſe perſons, places, or things, in reſpect of which they have ſo obtained. Theſe particular cuſtoms, which are exceptions to the general law, are eſtabliſhed by the ſame means, and upon the ſame authority, with the law itſelf, by the conſent of the ſociety or of its legiſlative body collected from its not putting a ſtop to them, notwithſtanding they have obtained for ſo long a time, that they muſt in all probability have fallen under public notice.

XVII. There is a plane reaſon, why it ſhould be more difficult to find out what is preſcribed by an unwritten law, than by a written one. The rules of unwritten law may indeed be committed to writing. But when they are, it will ſtill be a queſtion, whether ſuch writing

Unwritten law more difficult to be aſcertained than written law.

writing contains the law or not: becauſe it it will not appear from the writing itſelf, that it is authenticated, or that the rules, which it contains, are preſcribed by any legiſlator. The law is founded in uſage or cuſtom only: and conſequently it can only be collected from uſage or cuſtom. In the mean time the members of a civil ſociety are not left to their own obſervations to find out the unwritten laws of it. The records of what has been done from time to time in courts of judicature are evidences of the unwritten law; not only as to the methods of proceeding in the court itſelf, but likewiſe as to thoſe points, which have come into queſtion before it. If the methods of proceeding in the court itſelf are grounded upon unwritten law, the law, which regulates its proceedings, having thus ariſen out of its own practice, can appear only in its own records. The law, upon which any points of controverſy have been determined by the court, will likewiſe appear in the ſame records: becauſe they ſhew what the uſage and cuſtom appeared to be upon the fulleſt information, that the court could get. When [z] Grotius therefore teaches us to have recourſe, not only to our own obſervations, but to the judgment of others, who have had more and better opportunities, than we have had, of making obſervations upon ſuch general uſage or particular cuſtom, as has eſtabliſhed itſelf into a law; he points out the principle, upon which the determinations of courts of judicature are to be received as the moſt authentic evidences of unwritten law. The principle is, that their determinations are authentic evidences of what the uſage or cuſtom appeared to be upon the exacteſt ſcrutiny.

[z] L. I. C. I. §XIV.

XVIII.

XVIII. The unwritten laws of a civil ſociety are ſometimes repealed or altered by an expreſs act of the legiſlative power of the ſociety; that is, though they were eſtabliſhed at firſt by uſage or cuſtom, they are ſometimes repealed or altered afterwards by written laws. They may likewiſe be repealed or altered by long diſuſe or preſcription: for as the conſent of the ſociety, upon which they are eſtabliſhed, is collected only from the preſumptive evidence of uſage or cuſtom; ſo a long and uninterrupted diſuſe affords the ſame evidence, that the ſociety has conſented to repeal or alter them. Unwritten laws how repealed.

XIX. But if diſuſe repeals an unwritten law, only as it is a preſumptive evidence that the ſociety has conſented to repeal ſuch law; the conſequence will be, that no written law can be repealed merely by diſuſe; [a] becauſe no preſumption can ſet aſide a certainty: the record, in which the written law appears, is a certain evidence of its having been eſtabliſhed by ſufficient authority; whereas diſuſe affords at moſt only a preſumption of its having been repealed by the like authority. Written laws cannot be repealed by preſcription.

Written laws are indeed ſometimes ſaid to be grown obſolete. But then by their being obſolete we are not to underſtand, that they have ceaſed to oblige, whenever it ſhall be found neceſſary to put them in execution. Sometimes a written law is ſaid to be grown obſolete, when the circumſtances of thoſe, to whom it relates, are ſo changed, that the execution of the law would be of no uſe, notwithſtanding it might be a beneficial law at the time of making it. This happens more particularly, where the legiſlator had not the ſpecial matter of the law principally in view, but deſigned either to guard againſt ſome particular evil, which might, as he thought, probably be prevented,

[a] See B. I. C. VIII.

or to obtain ſome particular good, which might, as he thought, probably be advanced, by uſing ſuch cautions, and by following ſuch directions, as are preſcribed by the ſpecial matter of the law. When the evil therefore, which was in view, is no longer to be feared, or when the good, which was in view, is effectually obtained, the law becomes uſeleſs. Sometimes, though the execution of the law would be of the ſame advantage now, as when it was firſt made, we ſay, that it is become obſolete; if it has not for any conſiderable time been put in execution, ſo that what it enjoyns has been long neglected, or what it forbids has been long practiſed with impunity.

Where written laws are become obſolete in the former ſenſe; it may with ſome reaſon be called a hardſhip, if it is nothing more than a hardſhip, to put them in execution. For ſince all civil laws either have, or ought to have, the prevention of ſome evil or the attainment of ſome good in view; it is ſcarce conſiſtent with the nature of a civil law to lay any reſtraint upon the members of a ſociety, or to puniſh them for not complying with any reſtraint, where no evil will be prevented or no good be obtained by their compliance.

But where laws are become obſolete, in the latter ſenſe, either by any neglect of thoſe, whoſe buſineſs it is to put them in execution, or by any other accident; if it can be called a hardſhip to put them in execution afterwards, the only ground for calling it ſo is a ſuppoſition, that through ſuch long diſuſe many perſons may be ignorant of what the law requires of them. This hardſhip is effectually prevented, if the civil magiſtrate, or executive body, gives public notice beforehand, that ſuch a law will be put in execution: and though we uſually ſay, that a notice of this ſort revives an obſolete law; yet this revival is made without an act

of

of legiſlative power: the law is then in being, and all the members of the ſociety, that are concerned in it, are already bound to comply with it: the notice, which the civil magiſtrate gives, only informs them of what, through long diſuſe, they might poſſibly have forgotten.

XX. Civil laws may be divided into three ſorts; they are either public, or private, or mixed. Public laws are ſuch as have the civil power of the public for their object. Theſe laws may again be divided into ſuch as are fundamental, and ſuch as are not fundamental. Such public laws are called fundamental, as preſcribe the form and eſtabliſh the conſtitutional power of the legiſlative body of the ſociety. Laws, which determine the form of the legiſlative body, and give one part of the ſociety an excluſive right or power of legiſlation, cannot well be underſtood to have been derived originally from the legiſlative body itſelf. No part of the ſociety has originally any excluſive right of legiſlation: this right or power, as it ariſes out of civil union, is veſted in the whole collective body. And if no part has originally any right of this ſort; it cannot acquire any ſuch right by any act of its own; unleſs the reſt concur in this act, and by ſo concurring make it the act of the whole. General diviſion of civil laws.

Laws of this ſort are uſually underſtood to bind the legiſlative body itſelf, and not to to be alterable by its authority. And for this reaſon, when a legiſlative body, after it is eſtabliſhed, declares any law of its own making to be a fundamental law or a law of the conſtitution; the meaning of this declaration is, that the legiſlative body looks upon itſelf to be bound by this law.

But

But there are many laws in every civil ſociety, which are public, though they are not fundamental, many, which relate to the civil power, though they are derived from the conſtitutional legiſlative body, and are at all times ſubject to its authority. All laws, which regulate or reſtrain the executive body, either in the internal or external branch of its executive power, are of this ſort. Thoſe laws are public but not fundamental ones, which determine the method of calling and appointing civil magiſtrates to their reſpective offices, which ſettle the extent and limits of their power, or which regulate the proceedings in courts of judicature; and thoſe likewiſe, which fix the manner of raiſing, and governing, and maintaining the military force.

Civil laws, which adjuſt the mutual rights and obligations of the members of a civil ſociety in reſpect of one another, may be called private laws: becauſe they relate more particularly to private perſons. Of this ſort are all ſuch laws, as regulate the right, that a man has over his own perſon, or to direct his own actions; all ſuch, as either determine the manner of acquiring, or holding, or alienating private property, or regulate the ſeveral limitations, to which private property is ſubject; and all ſuch, as preſcribe the form and ſettle the effect of promiſes or contracts or oaths, not only of thoſe, by which private property or a right in things may be acquired, but of thoſe likewiſe, by which one member of the ſociety acquires a right over the perſon of another.

Thoſe civil laws may be called mixed ones, which regulate and preſcribe the mutual rights and obligations of the public or ſociety, and of the ſeveral members or private perſons, who are under its protection. Of this ſort are all ſuch laws, as guard the common welfare

welfare by enforcing the duties, which we owe either to God or to ourſelves; all ſuch, as determine the right, which the public has over the perſons of the ſubjects to demand their aſſiſtance, either in executing the laws within the ſociety, or in defending it againſt its enemies from without; all ſuch, as preſcribe what taxes, duties, or cuſtoms are to be paid by the ſubjects, by adjuſting the demand of the public upon the private property of the individuals, for the ſupport of the government, or for maintaining the common ſecurity, and advancing the common benefit; and all ſuch likewiſe, as regulate and aſcertain the ſpecial obedience, which the ſubjects owe to their eſtabliſhed governours. To the ſame head we may reduce all criminal or penal laws in general; becauſe all crimes are offences of private perſons againſt the public; and all puniſhment, in a ſtate of civil ſociety, is inflicted by the public upon private perſons.

In ſome conſtitutions the civil laws of ſucceſſion to the crown cannot be fundamental laws.

XXI. It may be a queſtion, whether a civil law, which ſettles the ſucceſſion to a kingdom, is a fundamental law or not. But unleſs this queſtion is ſtated more preciſely, it cannot well be underſtood: becauſe in ſome conſtitutions it may, and in others it cannot, be a fundamental law. In order therefore to determine rightly upon this queſtion, it will be neceſſary to diſtinguiſh between thoſe kingdoms, in which the king alone is the legiſlative body, and thoſe, in which he is only a part of ſuch body, whilſt the whole ſociety, either by itſelf or by its repreſentatives, is the other part. And if the king alone is the conſtitutional legiſlative body; it will be neceſſary to diſtinguiſh farther between thoſe kingdoms, which are, and thoſe, which are not patrimonial.

Firſt; in a patrimonial kingdom, if the king is the ſole

ſole legiſlative body, there is, by the ſuppoſition, no law at all, and therefore certainly no fundamental law, which regulates the ſucceſſion: becauſe the law, which ſettled the form of government, and the compact, made upon this law between the king and the people, are ſuppoſed to have given the king, who is in poſſeſſion, a power of chuſing and fixing his ſucceſſor. If any thing, which relates to the ſucceſſion, can be called fundamental, it is the obligation of the preſent poſſeſſor to leave the kingdom to his ſucceſſor in the ſame condition, in which he received it himſelf, that is, to leave it patrimonial without entailing it any farther, than upon the next immediate ſucceſſor, by any law of his own making. As he received it in this condition from the people, he has no conſtitutional power of altering their act without their conſent. And in fact, if he was to attempt to alter it, what he does would be prevented from producing any effect, unleſs he had the concurrence of the people: becauſe whatever he does without their concurrence is done only by a law of his own making: and ſince he tranſmits his own legiſlative power to the next immediate ſucceſſor, this ſucceſſor will have the ſame right to alter this law, that he had to make it: the conſequence of which will be, that the entail, which he introduces, cannot take place without the conſent of ſuch ſucceſſor.

Secondly; if the law, which fixes the ſucceſſion to the crown, can be looked upon as fundamental, it muſt be in thoſe kingdoms, in which the king alone is the conſtitutional legiſlative body, and the crown is made hereditary by the ſame act of the people, which appointed their king to be their ſole legiſlator. On the one hand the king in poſſeſſion, notwithſtanding he is the

the ſole legiſlative body, cannot change this law, without the conſent of the people: becauſe it was made originally by the legiſlative power of the ſociety: and if it does not bind him as a law, yet it certainly binds him as a compact; becauſe his immediate and direct conſent to it is implyed in his acceptance of the crown under the conditions, which the ſociety has thus eſtabliſhed. On the other hand, the people have by the ſame compact given up their legiſlative power to him, and conſequently cannot without his conſent repeal the law of the ſucceſſion, which they have once eſtabliſhed. The reader will do well to remember here, that we are now only conſidering the conſtitutional right of the people, and not any natural right, which they may have in caſes of neceſſity, or where the conſtitution is broken.

However, without having recourſe either to the equitable exception of neceſſity, or to a breach of the conſtitution, if the king in poſſeſſion and the body of the ſociety concur in changing the law of the ſucceſſion; there is no natural reaſon, why ſuch a concurrent act ſhould not be valid. For the notion of a fundamental law of any civil conſtitution does not conſiſt in its being unalterable by any human power whatſoever, but in its being unalterable by the conſtitutional legiſlative body, where this body is only a part of the whole ſociety. If there is any doubt, whether ſuch a concurrent act can of right limit or alter the ſucceſſion; this doubt muſt ariſe from a ſuppoſition, that the ſucceſſors, before they come into poſſeſſion, have acquired a right to ſucceed, which cannot without thier conſent be naturally taken from them. But it is evident, that if they, who would have ſucceeded, ſuppoſing the law had continued as it was, are yet unborn, they can

have no right at all: and conſequently no injury is done them, if the ſucceſſion ſhould, before they are born, be ſo limited or altered by the concurrent act of the king and the people, as to exclude them. The difficulty will be ſomewhat greater, if the ſucceſſors are in being at the time, when this alteration is made. But there are two ways, in which we may explane this difficulty. In the firſt place, the ſuppoſed right of the ſucceſſors is only an expectancy during the life of the preſent ſucceſſor: this expectancy is ſupported by nothing but the law; it cannot become a right, in the proper ſenſe of the word, till it is accepted: and as long as the preſent poſſeſſor lives, there can be no acceptance on the part of the ſucceſſor. If therefore the law, which ſupported the expectancy, is changed, before the demiſe of the preſent poſſeſſor; this expectancy can never become a right at all. Or otherwiſe. The ſucceſſors muſt be conſidered either as parts of the legiſlative, or as parts of the collective, body of the ſociety. But during the life of the preſent poſſeſſor, the ſuppoſition here made, that he alone is the legiſlative body, excludes them from being conſidered as parts of this body. And if they are conſidered only as parts of the collective body, the general act of the ſociety concludes them, whether they immediately and directly conſent to ſuch act or not.

Indeed when we conſider them only as parts of the collective body of the ſociety, nothing but the general ſecurity or general benefit can juſtify a change of the ſucceſſion: becauſe the whole exerciſe of civil legiſlative power is to be directed by this end; whether that power is exerciſed to repeal an old law or to make a new one; whether it is exerciſed by the conſtitutional legiſlative body, or by the collective body, or by both of

of them together. For ſince a civil ſociety has no other power over its members, whether they are the ſucceſſors to the kingdom, or others of inferiour rank, beſides what was originally deſigned for the general ſecurity or general benefit; it has no right, either by making a new law or by repealing an old one, to take away even the reaſonable expectancy of advantage from any of its members, unleſs the general ſecurity or general benefit requires that it ſhould be taken away.

This account of what may be done in reſpect of the law of the ſucceſſion to the crown, where the king alone is the legiſlative body, will ſhew us, that this law is not a fundamental law of the conſtitution, but is liable to be changed by the legiſlative body, and may be changed by it, without breaking in upon the conſtitution; if the body of the ſociety either by itſelf or by its repreſentatives is a part of ſuch legiſlative. Where the conſtitution has given the ſole legiſlative power to the king; he alone cannot change the ſucceſſion, which was ſettled by a law derived from the original legiſlative power of the ſociety: becauſe this law is binding upon him by means of a compact between him and the people, which, as it eſtabliſhed his right, eſtabliſhed likewiſe the ſucceſſion: and ſince he is only one of the parties to this compact, he cannot by any act of his own ſet the obligation of it aſide. In like manner the collective body of the ſociety is only one of the parties to the ſame compact, which veſted the legiſlative power in him: and conſequently as it cannot by any act of its own make this compact void; ſo neither can it make any law, which ſhall be binding, or repeal any, which was binding; becauſe as long as this compact ſubſiſts, it has no legiſlative power. But neither of theſe reaſons will hold in reſpect of a legiſla-

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tive body, of which the king is one part and the body of the ſociety, either by itſelf or by its repreſentatives, is the other part. For in ſuch a mixed legiſlative, as this, both the parties to the compact, which fixed the law of the ſucceſſion, are always preſent: the king in poſſeſſion is preſent on the one part; and the body of the ſociety is preſent on the other part. If indeed the body of the ſociety is itſelf diſtinguiſhed into two parts; one of which conſiſts of the ſelect few called nobles, and the other of the bulk of the ſociety, which is uſually called the people; in all changes, that are made in the law of the ſucceſſion to the crown, the concurrence of the nobles, when they are thus conſidered as a diſtinct part of the ſociety, is as neceſſary, as the concurrence of the reſt of the people: becauſe the change, if it is duly made, muſt be made by the joynt act of all, who were parties in the compact, by which the ſucceſſion was originally ſettled. No compact can be releaſed, and no law can be altered, without the conſent of all thoſe, who are parties to ſuch compact, or without the concurrent act of all thoſe by whoſe authority ſuch law was eſtabliſhed. The conſent therefore of the king in preſent poſſeſſion, and of what is here called the people, either by themſelves or by their repreſentatives, will not be ſufficient to produce a change in the ſucceſſion without the conſent of the nobles; if they were diſtinct parties to the original ſettlement of it, and are not repreſented by the repreſentatives of the people. But where the general body of the ſociety is thus diſtinguiſhed into the nobles and the people; if the conſtitutional legiſlative body conſiſts of the king who is in poſſeſſion, and the nobles, and the repreſentatives of the people, there are always preſent in

in ſuch a legiſlative body all the parties, who could be concerned from the firſt in any ſettlement of the crown: and conſequently ſuch a legiſlative body will have a power to limit or to change the ſucceſſion for the general ſecurity and benefit of the ſociety.

Controverted ſucceſſion may be ſettled by civil law.

XXII. [b] We may now underſtand what ſort of kingdoms Grotius is ſpeaking of, when he enquires, who can decide a controverſy, that ariſes in the life-time of a king, between two or more claimants to the ſucceſſion. In thoſe conſtitutions where the legiſlative body conſiſts of the king and the whole body of the ſociety, acting either by itſelf or by its repreſentatives, this can be no queſtion. For ſince ſuch a legiſlative body has a conſtitutional right of limiting the ſucceſſion by a civil law; there can be no doubt of its having a like conſtitutional right of putting an end to a controverſy of this ſort by the ſame means.

The enquiry therefore relates to thoſe conſtitutions only, where the king alone is the conſtitutional legiſlative body. Grotius tells his readers in expreſs words, that he had ſuch a kingdom in his mind: and if he had not told them ſo, it might eaſily have been collected from the reaſon, which he gives, why the people could not decide this controverſy, and interpret the law of the ſucceſſion authoritatively, ſo as finally to determine which of all the competitors has the beſt claim. The reaſon, which he gives, is, that the people have by the conſtitution entruſted all civil juriſdiction to their king. What he adds farther would, if it was true, encreaſe the difficulty. He ſuppoſes the civil juriſdiction to be given not only to the king, but to his family likewiſe; ſo that the people or the body of the ſociety, whilſt any of this

[b] Grot. L. II. C. VII. § XXVII.

family are in being, can have no juriſdiction at all, either by themſelves alone or joyntly with the preſent poſſeſſor. But this ſuppoſition is not true: the ſeveral claimants, or any others of his family, have no civil juriſdiction in his life-time; they have only an expectancy of ſuch a juriſdiction; and this expectancy will fail, if the law, which ſupports it, is altered before his death. However, the reaſon, which Grotius alledges, will conclude againſt the juriſdiction of the people to decide this controverſy by themſelves, or by their own authority, without this additional ſuppoſition: becauſe, without conſidering the ſucceſſors, the people have by the civil conſtitution veſted the legiſlative power in the poſſeſſor of the crown for the time being.

As the people alone could not decide this controverſy for want of legiſlative power; ſo neither could the king alone decide it: becauſe, as Grotius obſerves, the right to the ſucceſſion is not ſubject to the juriſdiction of the preſent poſſeſſor, unleſs in patrimonial kingdoms: in kingdoms, which are not patrimonial, if the king is the conſtitutional legiſlative body, the law of the ſucceſſion comes originally from the people, and by compact between him and the people is made binding upon him.

But though the people alone cannot decide this controverſy, for want of legiſlative power in general; and though the king alone cannot decide it, for want of legiſlative power in this particular inſtance; yet upon the principles, which have juſt now been explaned, the preſent poſſeſſor of the crown and the body of the ſociety together have a right to decide it by a joynt act. For all the parties to the original compact, by which the ſucceſſion was ſettled at firſt, are included in the king and the body of the ſociety: and conſequently whatever they do will be binding upon all.

CHAP.

CHAP. VII.

Of interpretation.

I. *Interpretation what.* II. *Province of interpretation.* III. *Three ſorts of interpretation.* IV. *Rules of literal interpretation.* V. *Mixed interpretation where to be uſed.* VI. *Three topics of mixed interpretation.* VII. *Words are to be conſtrued agreeably to the ſubject matter.* VIII. *Words are to be ſo conſtrued as to produce a reaſonable effect.* IX. *Words of a law or other writing are to be conſtrued by its circumſtances.* X. *Strict and large interpretation what.* XI. *Meaning of the writer how extended by rational interpretation.* XII. *Meaning of the writer how reſtrained by rational interpretation.* XIII. *Scarce any laws but what naturally admit of rational interpretation.*

Interpretation what.

I. A [a] Promiſe, or a contract, or a will, gives us a right to whatever the promiſer, the contracter, or the teſtator, deſigned or intended to make ours. But his deſign or intention, if it is conſidered merely as an act of his mind, cannot be known to any one, beſides himſelf. When therefore we ſpeak of his deſign or intention as the meaſure of our claim; we muſt neceſſarily be underſtood to mean the deſign or intention, which he has made known or expreſſed by ſome outward mark: becauſe a deſign or intention, which does not appear, can have no more effect, or can no more produce a claim, than a deſign or intention, which does not exiſt.

In like manner the obligations, that are produced by the civil laws of our country, ariſe from the intention

[a] Grot. L. II. C. XVI. § I.

of the legiſlator; not merely as this intention is an act of the mind; but as it is declared or expreſſed by ſome outward ſign or mark, which makes it known to us. For the intention of the legiſlator, whilſt he keeps it to himſelf, produces no effect, and is of no more account, than if he had no ſuch intention. Where we have no knowledge, we can be under no obligation. We cannot therefore be obliged to comply with his will; where we do not know what his will is. And we can no otherwiſe know what his will is, than by means of ſome outward ſign or mark, by which this will is expreſſed or declared.

From hence it appears, that the way to aſcertain our claims, as they ariſe from promiſes, contracts, or wills, and our obligations, as they ariſe from inſtituted laws, is to collect the meaning and intention of the promiſer, contracter, teſtator, or lawmaker, from ſome outward ſigns or marks. The collecting of a mans intention from ſuch ſigns or marks is called interpretation.

Province of interpretation.

II. [b] Words are the common ſigns, that mankind make uſe of to declare their intention to one another: and when the words of a man expreſs his meaning planely diſtinctly and perfectly, we have no occaſion to have recourſe to any other means of interpretation. But ſometimes a mans words are obſcure; ſometimes they are ambiguous; and ſometimes they expreſs his meaning ſo imperfectly, as either to fall ſhort of his intention and not expreſs the whole of it, or elſe to exceed his intention and expreſs more than he deſigned. In any of theſe caſes we muſt have recourſe to ſome other means of interpretation, that is, we muſt make uſe of ſome other ſigns or marks, beſides the words of

[b] Grot. ibid. §II. IV.

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the ſpeaker or the writer, in order to collect his meaning. Theſe other ſigns or marks are what Grotius ranks under the general head of probable conjectures. If we attend to this account of interpretation, to the end, that it has in view, and to the means, that it employs to come at this end, it will help us to diſtinguiſh interpretation from ſome other arts, with which it is frequently confounded.

Both the end and the means of interpretation will diſtinguiſh it from criticiſm. The end, which criticiſm aims at, is to find out what were the words of a writer; whether, for inſtance, the writing, that is before us, is forged or genuine; whether any parts of it, or at leaſt any material parts, have been foiſted in, or omitted, or eraſed, or altered. The end, which interpretation aims at, is to find out what was the intention of the writer; to clear up the meaning of his words, if they are obſcure; to aſcertain the ſenſe of them, if they are ambiguous; to determine what his deſign was, where his words expreſs it imperfectly. Without enquiring what means the critic makes uſe of, we may be ſure, that they cannot be the ſame with thoſe, that are made uſe of by the interpreter: for the interpreters work does not begin, till the critics is ended. We muſt be in poſſeſſion of the writers genuine words, before we can either ſhew from them what his intention was, or can have any grounds for calling in the aſſiſtance of conjectures to clear up their meaning, to aſcertain their ſenſe, or to determine, that the intention of him, who uſed them, is in any reſpect different from what they expreſs. It is one thing to determine, whether a writing, that is before us, is the genuine will of the perſon, whoſe will it is pretended to be; and another to

determine what was the intention of the teſtator in that will. The former of theſe points muſt be ſettled, before the latter can properly come into queſtion. We might indeed be able to clear up the meaning of the perſon, who dictated that writing: but this would not determine the meaning of the teſtator with any certainty; if there was any doubt, whether that writing was his genuine will, or not; unleſs this doubt was firſt removed.

Sometimes we are at a loſs to find out a writers meaning, merely becauſe we cannot read his writing: this obſcurity may be occaſioned by his uſing either a cypher, or abbreviations, or a hand, that we are unacquainted with. But the clearing up ſuch obſcurities as theſe is not the proper object of interpretation. It is indeed the buſineſs of interpretation to find out the meaning or deſign of a writer. But then it ſuppoſes, that we are in poſſeſſion of his words. And where we cannot read his writing, the difficulty of making out his meaning ariſes from our want of knowing what his words are.

It is not very eaſy to determine exactly, where the provinces of the grammarian and the lexicographer end, and the province of the interpreter begins. But though theſe provinces run into one another at their confines, they are diſtinct enough at their remoteſt extremities. The boy, who is learning the hebrew language by the help of his grammar and his lexicon, is certainly not employed in the ſame province with the divine, who ſettles the intent of the levitical lawgiver. And yet the divine is frequently indebted to nothing elſe but his ſkill in the original language for his diſcoveries of the meaning of the law. Interpretation

tion certainly ſuppoſes us to have a competent knowledge of the language, which the writer made uſe of, whoſe meaning we are to find out. Till we have acquired ſuch a knowledge as this; we cannot ſay, whether his words are clear or obſcure, whether they are ambiguous or preciſe. If we are able to read the characters, in which he wrote, or if what he has written is read to us by any one elſe; the words will be only empty ſounds, and cannot convey any meaning at all. We may, if we pleaſe, call our own ignorance of his language an obſcurity in his writing: but it is ſuch an obſurity, as is not to be cleared up by the topics of interpretation, but by the lexicon and the grammar. We do indeed call a man an interpreter who tranſlates what is ſpoken or written in a language, of which we are ignorant, into another language, with which we are better acquainted. But ſuch a man only ſupplies the place of a lexicon and a grammar: and if we would ſpeak diſtinctly and properly, he is rather to be called a tranſlator, than an interpreter. He gives us the words of the ſpeaker or of the writer; and then by means of the words, or of other conjectures, if ſuch conjectures are neceſſary, we are to make out the ſpeakers or the writers meaning. It ſeems to be an ignorance of the ſame ſort, though in a leſs degree, which makes any writing obſcure, where we have a competent knowledge of the language, but are not perfect maſters of it. This happens ſometimes even in our mother-tongue, in which, if there are no other words not generally underſtood, there are at leaſt many terms of art, which are a ſort of language by themſelves, and are not fully underſtood by the generality of the people, but by ſuch only, as have been employed in the trade or profeſſion, or have

ſtudyed the ſcience, to which thoſe terms belong. When a mans meaning, in what he ſpeaks or writes, is obſcure, becauſe he uſes ſuch words as theſe; it can ſcarce be looked upon as the province of interpretation to explane it. The only way of clearing up the obſcurity is to get a fuller knowledge of the language: this may be done by having recourſe to thoſe, who underſtand the terms of art or other words, that occaſion the obſcurity: but then they, to whom we thus have recourſe, only inſtruct us in the language, and may be looked upon as tranſlators: becauſe the inſtruction, which they give us, conſiſts in nothing elſe but in ſubſtituting a word, that we do underſtand, into the place of another, that we do not underſtand. But ſince a technical or other dictionary would do all for us, that they do; if we will call this by the name of interpretation, we may as well give the ſame name to what we do, when we learn a language, of which we were totally ignorant before. In languages, of which we have a competent knowledge, but not ſo perfect a knowledge, as we have of our mother-tongue, this ſort of obſcurity is more frequent: and as we are rather indebted to nice obſervations of our own upon the language, than to a grammar or a lexicon, for the clearing up ſuch obſcurities; we look upon what we do, when we clear them up, as a ſort of interpretation. But yet ſince theſe obſervations chiefly conſiſt in comparing the ſenſe, in which the ſame words are uſed upon different occaſions; all, that they lead us to, ſeems to be nothing more, than the common uſe of words in the language of the writer. We are conſtantly making the like obſervations upon our mother-tongue in our daily practice without knowing that we do make them.

And as ſtudy and attention fix them in our memories, when we make them upon other languages; ſo the frequency of them fixes them there, in the language of our own country.

There are indeed another ſort of obſervations, which conſiſt in etymological refinements. But theſe are as likely to miſlead, as to aſſiſt us, in giving the proper ſenſe to the words either of our own or of any other language. All words have their meaning originally from nothing elſe but the common conſent of thoſe, who uſe them. Their true ſignification therefore is to be determined by this common conſent, which muſt be looked for, not in the etymology of the words, but in common uſe and cuſtom. We may take pains, or may amuſe ourſelves, in finding out the roots of words, and in deriving them from theſe roots by rules of etymology. But when we have done all, that we can do, in this way; an ordinary man, who has no other verbal learning, than what he has been furniſhed with by common diſcourſe in the language, to which theſe words belong, will be more likely to give them their true ſenſe, than we ſhall be with all our refinements. In dead languages this ſort of learning ſeems to have ſome uſe. We are forced to have recourſe to its help, where we can get no better: we are forced to gueſs at the ſenſe of a word, which is uſed but ſeldom, or perhaps only once, by the ſenſe of the root, from which that word is derived. But this can never be done with any appearance of reaſon, unleſs the root is uſed more frequently, than the word itſelf: becauſe otherwiſe the ſenſe of the root will be as uncertain, as the ſenſe of the word. And even where the ſenſe of the root is better aſcertained, a few ſlight obſervations either upon

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our own language, or upon any other, that we are well acquainted with, will ſerve to ſhew us, that derivative words have often a very different ſenſe, from what we ſhould have imagined them to have, if inſtead of attending to their common uſe, we had attended only to their etymology.

However, though the mere tranſlator is certainly employed in a different province from that of interpretation; yet ſince a more exact knowledge of language, than the grammar or lexicon can teach us, is frequently required to clear up the meaning of a ſpeaker or a writer, where it is obſcure; we may well conſider this knowledge as having a ſhare in the buſineſs of interpretation.

Three ſorts of interpretation.

III. Interpretation, as we have already defined it, conſiſts in finding out or collecting the intention of a ſpeaker or of a writer either from his words, or from other conjectures, or from both. It may therefore be divided into three ſorts, according to the different means, that it makes uſe of, for obtaining its end. Theſe three ſorts of interpretation are literal, rational, and mixed. Where we collect the intention of the ſpeaker or the writer from his words only, as they lie before us, this is literal interpretation. Where his words do not expreſs his intention perfectly, but either exceed it or fall ſhort of it; ſo that we are to collect it from probable or rational conjectures only, this is rational interpretation. And where his words, though they do expreſs his intention, when they are rightly underſtood, are in themſelves of doubtful meaning, and we are forced to have recourſe to the like conjectures to find out in what ſenſe he uſed them; this ſort of interpretation is mixed, it is partly literal and partly

partly rational; we collect the intention of the ſpeaker or the writer from his words indeed, but not without the help of other conjectures.

IV. [c] If the words and the conſtruction of a writing are clear and preciſe, we ſcarce call it interpretation to collect the intention of the writer from thence. But the definition of interpretation will beſt inform us whether it is to be called by this name, or not. Interpretation conſiſts in collecting the intention of a man from the outward ſigns, that he makes uſe of to declare his intention: it muſt therefore certainly be one branch of interpretation to collect his intention from his clear and preciſe words, as they lie before us. The only reaſon, that we can have to doubt, whether this is to be called interpretation or not, is, that we commonly include ſomething of art, or ſkill, or ſagacity, in our notion of interpretation: and there does not ſeem to be any art, or ſkill, or ſagacity, in finding out a mans meaning, where his words expreſs it clearly and preciſely. That this is the reaſon of our doubt appears from our readineſs to give the name of interpretation to our collecting the intention of a writer from his words only; when there is any obſcurity ariſing either from unuſual words or from a perplexed conſtruction, which cannot be removed without more ſkill in the language, that he writes in, than moſt people are maſters of. But certainly if this is to be called interpretation, we may as well give the ſame name to our collecting of his intention from his words only, when there is no ſuch obſcurity: becauſe though ſome art or ſkill is neceſſary to remove that obſcurity, it is not properly the art or ſkill of an interpreter, but of a grammarian

Rules of literal interpretation.

[c] Grot. Ibid. §II. III.

or

or a lexicographer. Sometimes however, when the intention of a writer is to be collected from his plane words, we call it interpretation without any ſcruple. Suppoſe, that we had a will before us, which is to be interpreted, and that I was to contend for a rational interpretation of it: if you were of a different opinion from me, you would expreſs this opinion by ſaying, that we ought to follow the literal interpretation. Now as I, by contending for a rational interpretation, mean, that we are to collect the teſtators intention from ſomething elſe beſides his words; you by contending on the contrary, that we ought to follow a literal interpretation, muſt mean, that we ought to collect his intention from his words only. Thus, though we doubt whether literal interpretation, which conſiſts in collecting a mans intention from his words only, is to be called interpretation, when we conſider it alone; we have no ſuch doubt, when we come to compare it with another ſort of interpretation, which conſiſts in collecting his intention from ſomething elſe beſides his words.

The principal rule to be obſerved in literal interpretation is to follow that ſenſe, in reſpect both of the words and of the conſtruction, which is agreeable to common uſe, without attending to etymological fancies or grammatical refinements. We have already ſeen the reaſon, why we are to attend rather to common uſe, than to etymology, in determining the ſignification of words. And if the reader underſtands what I mean by grammatical refinements, he will readily ſee a reaſon, why we are to attend to common uſe rather than to them. By grammatical refinements then I mean ſuch rules of conſtruction, as are not juſtified by the common

common uſage of the language before us, and have nothing elſe to ſupport them, but ſome groundleſs conjecture or ſome ſuppoſed analogy between this language and others. The rule, when it is thus explaned, will be found not to differ from one, which is more commonly laid down: we are uſually directed in interpreting writings to follow the literal and grammatical ſenſe; the literal ſenſe, as to the words themſelves, and the grammatical ſenſe, as to the conſtruction of them. In this rule, we are to underſtand by the literal ſenſe ſuch a plane ſenſe of the words, as cuſtom and uſage has given them, and not ſuch an etymological ſenſe as fancy may have invented. And by the grammatical ſenſe we are to underſtand that ſenſe, which ariſes from ſuch a grammatical conſtruction, as the like cuſtom and uſage will ſupport, and not that refined ſenſe, which depends upon a conſtruction ſupported only by ſuch rules of grammar, as, inſtead of being copied from common uſe, are intended to over-rule its authority.

The locrians coming into the extreme parts of Calabria found the ſicilians in poſſeſſion of it. But the ſicilians, being alarmed at their unexpected arrival, made a league with them, in theſe words — That the locrians would preſerve amity with them, and would allow them to enjoy that country in common with themſelves, as long as they ſhould tread upon this earth and have theſe heads upon their ſhoulders. The locrians, when they came to ſwear to this contract, had firſt put earth in their ſhoes, and had privately faſtened upon their ſhoulders heads of garlick. And as ſoon as they had taken the oath, they threw the earth out of their ſhoes and the heads of garlick from their ſhoulders; and upon the firſt opportunity drove the ſicili-

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ans out of the country. In common uſe the literal and grammatical ſenſe of theſe expreſſions — As long as we tread upon this earth, and as long as we wear theſe heads upon our ſhoulders — are equivalent to our ſaying — as long as we live. The locrians might indeed call theirs a literal and grammatical ſenſe. But it is ſuch a literal and grammatical ſenſe, as common uſage knows nothing of. When Temures had articled with the garriſon of Sebaſtia, that no blood ſhould be ſhed; he ordered all the priſoners to be buried alive. He might ſay, that he kept to the letter and to the grammar of his articles; for though he took away the lives of the priſoners he did not ſhed their blood. But — not to ſhed their blood; — when the words are underſtood according to ſuch a literal and grammatical ſenſe, as common uſage has given them; does not barely mean — not to kill them by letting out their blood; it means — not to kill them at all in any manner whatſoever.

We may now perhaps be able to reconcile this ſeeming contradiction; that the literal and grammatical performance of a contract is not a due performance of it; and yet that every contract is to be underſtood according to the literal and grammatical ſenſe of the words, in which it is expreſſed. By the literal and grammatical ſenſe we ſometimes mean ſuch a ſenſe, as the words will juſt bear, and ſometimes we mean ſuch a ſenſe as common uſe has given them. All contracts ought to be underſtood according to this latter ſenſe; and a performance of them according to the former ſenſe is not a due performance.

Mixed interpretation where to be uſed.

V. [d] Where the words of a contract, or of a will, or of a law, may be ſo ſtrained as to admit of a ſenſe, which,

[d] Grot Ibid. § IV

though

though it does not hurt the grammar and is not inconſiſtent with the letter, is ſuch a ſenſe as common uſage will not juſtify; we can ſcarce call theſe words ambiguous. For words are then only to be looked upon as ambiguous, when they will admit of two or more ſenſes, and either of theſe ſenſes is equally agreeable to common uſage. This is frequently the caſe: and when it is; inſtead of appealing to common uſage, which is the ſole principle of literal interpretation; we muſt have recourſe to mixed interpretation, and muſt collect the intention of the ſpeaker, or of the writer, partly from his words, and partly from other conjectures. When we have no reaſon to believe, that his words expreſs his meaning imperfectly, that is, that they expreſs either more or leſs than he intended; we are to look for his intention within the literal and grammatical ſenſe of his words: but becauſe his words will admit of two or more literal and grammatical ſenſes; and common uſage will not fix the preciſe ſenſe, in which he uſed them; we muſt have recourſe to other conjectures to fix it.

The ambiguity of a writing, whether it is a law, or a will, or a contract, depends ſometimes upon the doubtful ſenſe of a ſingle word, ſometimes upon the doubtful conſtruction of a ſentence, and ſometimes upon a compariſon of one part of the ſame writing with another, or of the writing, which is before us, with ſome other writing, which came from the ſame hand. If the law orders, that a perſon ſhall do a certain act within the ſpace of two, three, or more, months, from ſuch a particular time; the intention of the lawmaker is doubtful as to the time limited; and this doubt ariſes from the ambiguous ſenſe of the ſingle word

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month, which may mean either a calendar month, or a month conſiſting of twenty-eight days. Common uſe will not determine the ſenſe for us: becauſe in common uſe the ſame word is uſed in both theſe ſenſes. I bequeath all my plate to my elder ſon, except one thouſand ounces, which I bequeath to my younger ſon, and direct, that the elder ſhall, within a certain time after my deceaſe, deliver to the younger one thouſand ounces of my ſaid plate, of ſuch ſort and ſuch pieces as he pleaſes. The conſtruction of the ſentence will make it doubtful which of my two ſons the word — he — refers to, whether I intended to leave the choice of the ſort and of the pieces to the elder or to the younger. The levitical law ſays — [e] If brethren dwell together, and one of them die, and have no ſon; the wife of the dead ſhall not marry without, unto a ſtranger; her huſbands brother ſhall go in unto her, and take her to him to wife. If we were to read only this clauſe of the law, we ſhould have no doubt about the meaning of the word — ſon, but ſhould naturally conclude, that it is uſed in its common acceptation for a male child, and conſequently that, though the deceaſed brother had a daughter, the ſurvivor is bound to marry the widow of the deceaſed. But then, in the original language of the law, the word ſon is ſometimes uſed generally to ſignify any child either male or female: and we find, that where a man died without a male child, the [f] ſame law, in another part of it, ſubſtitutes his daughter into his place and conveys the inheritance to her. From comparing theſe two parts of the law together it becomes doubtful, whether the word ſon, in the former of them, is uſed in its ſtricteſt ſenſe for a male child

[e] Deut. XXV. 5. [f] Numb. XXVII. 8.

only,

only, or in its general ſenſe for any child of either ſex. The common uſe of the word will juſtify either acceptation: we muſt therefore have recourſe to ſomething elſe, beſides the word, and the common uſe of it, to collect the intention of the lawmaker.

When [s] Puffendorf is to ſhew, how a clauſe in a law, which is preciſe and determinate in itſelf, becomes ambiguous, by comparing it with ſome other clauſe either in the ſame law, or in a different law, which came from the ſame legiſlator; he makes uſe of ſuch inſtances, as belong to another head. One law, ſays he, enacts, that a ſtatue ſhall be erected in the gymnaſium in honour of any perſon, who kills a tyrant. Another law enacts, that no woman ſhall have a ſtatue in the gymnaſium. Now it happens, that a woman kills a tyrant. Here indeed it will be a queſtion, what is the intention of the lawmaker, when ſuch a caſe happens. But the queſtion does not ariſe from any ambiguity, that there is in the words of either of theſe laws, when it is compared with the other. The words of each law are clear and preciſe, not only when the laws are conſidered ſeparately, but likewiſe, when they are compared together. The doubt ariſes from the impoſſibility of complying with both the laws, in this particular caſe: and the queſtion is, which of them we may neglect moſt conſiſtently with the intention of the legiſlator. In this inſtance we are not to collect his intention, as we do in ambiguous laws, from mixed interpretation, ſo as to act up to his words, but to give thoſe words, which are doubtful in themſelves, a preciſe and determinate ſenſe by conjectures: we are left to collect his intention by rational interpretation, or from

[s] B. V. C. XII. § VI.

conjecture only: for whichever of the two laws we comply with, it is impoſſible, that we ſhould in any ſenſe act up to the letter or keep within the words of the other. Another of his examples is taken from a law, which by a particular accident claſhes with itſelf. The law ſays, that a woman, who has been raviſhed, ſhall have her choice, either to compel the man, by whom ſhe was raviſhed, to marry her, or to have him put to death. The ſame man has raviſhed two women. One of them demands him in marriage; the other demands his life. We may have an uſe for this example hereafter, but this is certainly not the proper place for it. The caſe here ſuppoſed does not make the words of the law ambiguous, but makes it impoſſible to comply with it in all its parts. The intention of the lawmaker is indeed doubtful. But this doubt does not ariſe from any ambiguity introduced into his words by the accident here ſuppoſed. The doubt is, which part of the law he would have us comply with, when we cannot comply with both. And this doubt is not to be determined, by ſettling the preciſe meaning of his words from conjecture. We here have recourſe to conjecture for a very different purpoſe, for the purpoſe of finding out an intention, which is not expreſſed in his words, in any ſenſe of them whatſoever. Grotius reduces all queſtions of this ſort, to the head of [h] rational and not of mixed interpretation: he does not treat of them, when he is enquiring what conjectures are to be made uſe of to find out the intention of the lawmaker, where his words will admit of more ſenſes, than one; but when he is enquiring how we are to find out what his intention is in ſome particular caſe, which makes it im-

[h] Grot. L. II. C. XVI. § XXVII. XXVIII.

poſſible

poſſible to act up to any intention, that the letter of the law expreſſes.

VI. In mixed interpretation, where the intention of the writer is expreſſed in his words, but the words are ambiguous and will admit of more ſenſes than one, ſo that we are forced to have recourſe to rational conjectures in order to determine, in which of the ſeveral ſenſes the words were uſed; [1] the topics, from whence our conjectures are drawn, are either the ſubject matter of the writing, or the effect, that it will produce, according as we conſtrue it in this or in that ſenſe, or laſtly ſome circumſtances, that are connected with it. Three topics of mixed interpretation.

VII. [k] When any words or expreſſions in a writing are of doubtful meaning, the firſt rule in mixed interpretation is to give them ſuch a ſenſe, as is agreeable to the ſubject matter, of which the writer is treating. For we are ſure on the one hand, that this ſubject-matter was in his mind, and can on the other hand have no reaſon for thinking, that he intended any thing, which is different from it, and much leſs, that he intended any thing, which is inconſiſtent with it. If a truce is agreed upon for thirty days; the word — day — muſt mean a natural day conſiſting of twenty four hours, and not an artificial day, or that ſpace of time, during which the ſun is above the horizon. This latter ſenſe is inconſiſtent with the ſubject matter of the agreement. For a truce is a continued ceſſation of arms: and there can be no continued ceſſation of arms for thirty days, unleſs it is for thirty natural days: becauſe thirty artificial days are not a continued ſpace of time, but are interrupted by as many nights. [l] When St. Peter had heard upon what occaſion Cornelius had ſent for him; he begins his diſcourſe with ſaying, that God is no reſpecter of perſons, Words are to be conſtrued agreeably to the ſubject matter.

[1] Grot. ibid. § V. VI. VII. [k] ibid. § V. [l] Acts X. 34. 35.

but that in every nation he, that feareth him, and worketh righteouſneſs is accepted with him. We may underſtand St. Peter to mean either, that perſons of all nations, whether they receive or reject chriſtianity, if they only fear God and work righteouſneſs according to the principles of the light of nature, will be alike rewarded by him in a world to come; or elſe that perſons of all nations, as well as the jews, provided they are ready to do the will of God, were alike deſigned by him to be admitted into the chriſtian covenant. The ſubject matter, upon which the apoſtle was ſpeaking, will determine us to give this latter ſenſe to the doubtful expreſſion of being accepted with God. The caſe before him was that of a religious gentile, who had been called by God to the knowledge and belief of the goſpel, and was deſirous, if it might be, of being inſtructed in that knowledge and of receiving that faith; at a time, when the apoſtles, as well as the other chriſtian converts, were of opinion, that this was the particular privilege of the jewiſh nation. His intention therefore, if we judge of it by the ſubject, upon which he was ſpeaking, muſt relate to ſuch acceptance only, as conſiſts in being admitted into the chriſtian covenant. Whether God will reward thoſe hereafter, who live according to the principles of the light of nature, though they reject the belief of the goſpel, was a ſubject, that did not then come before him. If therefore, when he ſays, that in all nations they, who fear God and work righteouſneſs, are accepted with him, we ſuppoſe his intention to be, that whoſoever lives according to the principles of the light of nature, though he rejects the goſpel, ſhall be equally admitted to the future rewards of heaven, with thoſe, who receive it; we give his words a groundleſs meaning;

meaning; becauſe we give them ſuch a meaning as does not appear from the ſubject-matter to have been in the mind of the ſpeaker.

VIII. [m] The ſecond rule, in mixed interpretation, is to give all doubtful words or expreſſions that ſenſe, which makes them produce ſome effect; this effect muſt in general be a reaſonable one; and it muſt likewiſe be the ſame, that the lawmaker or the teſtator or the contracter intended to produce. Words are to be ſo conſtrued as to produce a reaſonable effect.

Firſt; All doubtful words or expreſſions are to be taken in ſuch a ſenſe, as will make them produce ſome effect; that is, they are ſo to be conſtrued, as to give them ſome meaning: for to take them in any ſenſe, that will make them produce no effect, is in reality to give them no meaning at all. The rule therefore of taking all doubtful words or expreſſions in ſuch a ſenſe, as will make them produce ſome effect, amounts to the ſame thing, as if we had ſaid, that all words are to be conſtrued in ſuch a manner, as will give them ſome meaning. Any other conſtruction of them, inſtead of pointing out the intention of the writer or the ſpeaker, ſuppoſes him to have uſed the word without any intention at all. If the teſtator, as we juſt now ſuppoſed, bequeaths all his plate to his elder ſon, except one thouſand ounces, which he bequeaths to his younger ſon, and directs that the elder ſhall, at a certain time, deliver to the younger one thouſand ounces of the ſaid plate of ſuch ſort and ſuch pieces, as he pleaſes; this rule would determine the intention of the teſtator to have been, that his younger ſon ſhould have the choice of the ſort and the pieces. The ambiguous words—of ſuch ſort and ſuch pieces as he pleaſes—would in the

[m] Grot. ibid. § VI.

contrary conſtruction be needleſs, and produce no effect. If the choice had been intended for the elder ſon, the teſtator would have had no occaſion to add theſe words. For by leaving all his plate to the elder, except one thouſand ounces of it, which the elder within a certain time is to deliver to the younger, the ſort and pieces to be delivered would of courſe have been at the option of the elder; ſince the younger would by the will have had no claim but to a certain weight of plate. When therefore the teſtator goes on, and ſays, that it ſhall be of ſuch ſort and ſuch pieces, as he pleaſes; to give theſe words any meaning or to make them produce any effect, which would not have been produced without them, it muſt have been the intention of the teſtator to transfer the choice to the younger from the elder, to whom of courſe it would have belonged, if he had not added this clauſe.

Secondly, ambiguous words or expreſſions are ſometimes capable of two ſenſes, and will produce ſome effect in either of the two. The rule then goes farther, and ſays, that the effect muſt be a reaſonable one. No other effect can be ſuppoſed to have been in the ſpeakers or writers intention; becauſe no man can be ſuppoſed to intend what is abſurd or unreaſonable. We meet with an example in Puffendorf, which belongs rather to this head, than to that, under which he mentions it. Labeo having agreed by a league with Antiochus, that the latter ſhould give up half his fleet, cut every ſhip in two. The words would perhaps admit of this conſtruction, and would certainly produced ſome effect, if they were thus conſtrued. But it is ſuch an effect, as can never be ſuppoſed to have been in the mind of Antiochus, when he agreed to theſe conditions; becauſe it

is an unreaſonable and abſurd one. If the words will admit of this meaning, yet it could not be his meaning: by agreeing to part with half his fleet, he cannot be ſuppoſed to have conſented, that the half, which he parts with, ſhould be underſtood in ſuch a ſenſe, as would in effect deprive him of the whole.

All civil laws and all contracts in general are to be ſo conſtrued, where the words are of doubtful meaning, as to make them produce no other effect, but what is conſiſtent with reaſon or with the law of nature. And where men live in a ſtate of civil ſociety all doubtful words in any of their contracts with one another are to be conſtrued in that ſenſe, which will produce an effect that is conſiſtent with the civil laws of the ſociety, to which they belong. For where nothing appears to the contrary, the preſumption is, that they meant what they ought to mean, or that they deſigned nothing, but what the law allows. Thus if the civil law has fixed the intereſt of money at five pounds, for the loan of an hundred pounds, for one year, and the lender ſtipulates for the payment of fifty ſhillings at the end of ſix months; we muſt here by the word — month — underſtand calendar months. The word indeed would produce ſome effect, if we were to conſtrue it to mean months of twenty eight days or four weeks; but this effect would be inconſiſtent with the law: becauſe it would make the intereſt higher, than according to the rate of five pounds for one year.

Thirdly; [n] Grotius ranks the reaſon of a law amongſt thoſe topics of mixed interpretation, which are drawn from its circumſtances: but I ſhould rather chuſe to rank it amongſt thoſe, which are drawn from its effect.

[n] Ibid. § VIII.

The reaſon or final cauſe of a law conſiſts in the end, which the legiſlator intended to obtain, or in the effect, which he intended to produce, by making the law. And when we argue, that any ambiguous words, which we meet with in a law, muſt be underſtood in one particular ſenſe, rather than in any other, which they might poſſibly admit of, becauſe this particular ſenſe is agreeable to the reaſon of the law; our meaning is, that in this ſenſe of the words the law will produce the effect, which the legiſlator intended to produce by it.

The reaſonableneſs of this topic of interpretation is evident. For ſince the reaſon of a law conſiſts in the end, which the lawmaker intended to obtain, or in the effect, which he intended to produce by it; and ſince he cannot be ſuppoſed to intend the end, without intending the means; if we give his words ſuch a meaning, as is agreeable to the reaſon of the law, or ſuch a meaning, as will make the law produce the effect, which he intended to produce by it, we give them ſuch a meaning, as is agreeable to his intention.

Our author cautions his readers not to confound the meaning of a law with the reaſon of it; but he does not explane either the one or the other diſtinctly enough to point out the mark of difference between them. The meaning of a law is the deſign of the lawmaker in reſpect of what he commands or forbids. The reaſon of a law is his deſign in reſpect of the end or purpoſe, for which he commands or forbids it. If the words of a law, where it commands or forbids any action, will admit of more ſenſes, than one; this ambiguity renders the meaning of the law uncertain, or leaves it doubtful what action the lawmaker deſigned

to

to command or to forbid. At the ſame time the reaſon of the law may be expreſſed in ſuch clear and preciſe words, as to leave no doubt at all about the ultimate effect, which the lawmaker deſigned to produce, or about the end, which he deſigned to obtain, by what he has commanded or forbidden. The rule here is, that the meaning of the law is to be determined by the reaſon of it, or that the deſign of the lawmaker, in reſpect of what he commands or forbids by the law, is to be collected from the effect, which he deſigned ultimately to produce by it.

A levitical law, which has been already explaned, will help to illuſtrate this rule. The law ſays — Thou ſhalt not take a wife to her ſiſter to vex her, to uncover her nakedneſs beſides the other in her life-time. — Now the idiom of the original language has left the meaning of the law doubtful in reſpect of what is forbidden: it is not certain, whether the lawmaker deſigned to forbid the marriage of a man with the ſiſter of his firſt wife in particular or whether he deſigned to forbid a marriage with any ſecond wife at all, in the life-time of the firſt. But the reaſon of the law is expreſſed preciſely enough to leave no room to doubt about it: whatever was here deſigned to be forbidden, the legiſlator in forbidding it deſigned to guard the domeſtic happineſs of the firſt wife — Thou ſhalt not take a wife to her ſiſter *to vex her*. If therefore we collect the meaning of the law from the reaſon of it, that is, if we give the doubtful words of prohibition ſuch a ſenſe, as will make the law produce the effect, which the legiſlator deſigned to produce by it; we muſt conſtrue it to be a general prohibition of marrying any ſecond

wife

wife in the life-time of the firſt, and not a particular prohibition of marrying the ſiſter of ſuch firſt wife: becauſe her domeſtic happineſs would be as likely to be diſturbed; if her huſband in her life-time married any ſecond wife; as if he married her own ſiſter.

Some caution however is neceſſary to be obſerved in applying this topic of interpretation. Before we attempt to determine the meaning of ambiguous words or expreſſions in any writing by arguing from the reaſon, upon which the writer proceeded, or from the end, which he had in view; we muſt take care to ſhew, as evidently as we can, that we are in poſſeſſion of his true reaſon. For if there is any doubt about this point; though the meaning, which we give to his words, may ſuit exactly with the reaſon, which we ſuppoſe him to have had in view; our interpretation will be as doubtful in the concluſion, as it is in this firſt principle. The ſafeſt ground to ſtand upon is what the writer himſelf affords us: when the legiſlator has planely declared the reaſon of the law in the body of it; we may argue from thence with certainty: but when we are left to collect it by ſome other means, the foundation of our argument will be only conjectural: and the juſtneſs of our interpretation of the law will depend upon the evidence, by which our conjectures about the reaſon of it are ſupported.

Words of of a law or other writing are to be conſtrued by its circumſtances.

IX. There are numberleſs [a] circumſtances of laws, or contracts, or wills, which may help to aſcertain the meaning of the writer, where he has made uſe of any ambiguous words or expreſſions. Grotius divides theſe circumſtances into two ſorts, into ſuch as are connected with the writing in origin only, and ſuch as are

[a] Grot. Ibid.

connected

connected with it in place as well as in origin. To these two sorts we may add a third: for there are some circumstances, which seem to be connected with a law, or a contract, or a will, rather in time, than either in origin or in place.

When the words of a law, or a contract, or a will, are capable of two or more different senses, so that the meaning of the writer is left doubtful; what has been spoken or written by the same lawmaker, or contracter, or testator, upon some other occasion, is a circumstance of the doubtful writing. But whenever we alledge any thing as a circumstance of a doubtful writing; and argue from it to ascertain the meaning of the writer; it is necessary to shew, that the writing and what we so alledge have some connection with one another. For nothing, which is wholly unconnected with such writing, can either be made use of to explane any ambiguous words in it, or with any propriety be called a circumstance of it. The origin of what has been spoken or written by the lawmaker or contracter or testator upon some other occasion, makes it a circumstance of the law, or contract, or will in question; they had both the same origin, and are connected with one another by coming from the same person.

In doubtful matters it is reasonable to presume, that the same person is always in the same mind, where nothing appears to the contrary; that whatever was his design at one time, the same is likewise his design at another time, where no sufficient reason can be produced to prove an alteration of it. If the words therefore of any writing will admit of two or more different senses, when they are considered separately, but must necessarily be understood in one of these senses rather than

than the other, in order to make the writers meaning agree with what he has ſpoken or written upon ſome other occaſion; the reaſonable preſumption is, that this muſt be the ſenſe, in which he uſed them.

We frequently apply this rule of interpretation in reading the works of any author either antient or modern. If we meet with a paſſage, which is of doubtful meaning, we uſually make him, if we can, a commentator upon himſelf, by comparing this with ſome other paſſage in his writings. And whatever we find to have been his meaning, where he ſpeaks planely, we conclude to have been likewiſe his meaning, where he ſpeaks doubtfully.

The law of Moſes ſays, — If thy brother be waxed poor and fallen to decay with thee, then thou ſhalt help him, a ſtranger or a ſojourner, that he may live with thee: thou ſhalt not give him thy money upon uſury, nor lend him thy victuals upon increaſe. Here it is a queſtion, whether the legiſlator meant, that the iſraelites ſhould thus help a poor ſtranger, or that a ſtranger ſhould thus help a poor iſraelite. For the words, which are wanting to make the ſentence complete may be ſo ſupplyed, as to give it either of theſe ſenſes. When I had occaſion before to mention this law, I endeavoured to aſcertain the meaning of it by the help of another, which came from the ſame legiſlator. —Unto a ſtranger thou mayeſt lend upon uſury, but to thy brother thou ſhalt not lend upon uſury. This ſecond law puts a difference between an iſraelite and a ſtranger, in reſpect of lending money to either of them, by allowing the iſraelites to lend upon uſury to ſtrangers, whilſt it forbids them to lend upon uſury to their brethren. We muſt therefore underſtand the legiſlator to mean in the former

former law, not that an iſraelite ſhould help a poor ſtranger by lending him money without uſury, but that a ſtranger, who was permitted to live amongſt the iſraelites, ſhould thus help a poor iſraelite: becauſe otherwiſe the two laws would be inconſiſtent with one another; the legiſlator would in one of them expreſsly allow what in the other he expreſsly forbids.

When we explane a doubtful part of a law, or a contract, or a will, by the help of ſome other part of it; the clauſe, which we make uſe of for this purpoſe, is a circumſtance, which is connected with the clauſe to be explaned in place as well as in origin: as they both came from the ſame hand, ſo they are both found together in the ſame writing.

Grotius might perhaps conſider the reaſon of a law, as a circumſtance, which is connected with the law in place and origin; becauſe the enacting clauſes of a law, and the reaſon, upon which it proceeds, may both be contained in the ſame writing. But this is not always the caſe: a legiſlator ſometimes only preſcribes what is to be done or to be avoided, without mentioning any reaſon, why he preſcribes it. And certainly the reaſon of the law, when it is left to be collected by other means, and does not appear in the ſame writing with the law, cannot be conſidered as a circumſtance, which is connected with it in place. Nor can the reaſon of the law be properly conſidered as a circumſtance, which is connected with it in origin; whether ſuch reaſon appears in the ſame writing with it or not. For the reaſon of the law ariſes from the nature of things or from the particular ſituation of thoſe, who are to be directed by the law; whilſt the law itſelf ariſes from the underſtanding and will of the legiſlator; it preſcribes ſuch a conduct, as in his judgment is moſt likely to be

be for the benefit of thoſe, who are in that particular ſituation.

Contemporary practice is a circumſtance, which is connected with a law in time. It may indeed be ſaid to be connected with the law not only in time but in place too: for it conſiſts in what was uſually done in the place, where the law was made, at or near the time of making it. But this is not ſuch a connection in place, as our author means, where he ſpeaks of circumſtances, which are connected with a law in place as well as in origin. He means, that a doubtful clauſe in a law and ſome circumſtance, which will help to clear up the doubt, may be connected with one another by being contained in the ſame writing.

There are two ſorts of contemporary practice; and either of them may be applyed to the purpoſe of explaning any ambiguous words or expreſſions in a law. The firſt ſort is the common practice, which prevailed amongſt the people at the time, when the law was made. The ſecond ſort conſiſts in what was done upon the law in the times immediately after the making of it. From the practice, which prevailed amongſt the people at the time, when a law was made, we may with ſome degree of probability collect with what view it was made, what good the legiſlator deſigned to advance or to ſecure, and what harm he deſigned to prevent or to reſtrain. But this ſort of contemporary practice, ſince this is the only uſe, that can be made of it in interpreting laws, is only a remote topic of interpretation: it helps us in our conjectures about the reaſon of the law; and then from the reaſon of the law we aſcertain the meaning of the legiſlator in any ambiguous words or expreſſions, that he has made uſe of.

Whe

When I ſpeak of what has been done upon a law, ſoon after it was made; I do not mean what has been done upon it by any court of judicature, which is an authorized interpreter of the civil laws of the ſociety, where the law was made; but I mean the practice, which it produced amongſt the people, or what was done in conſequence of it by thoſe, who were obliged, and might be ſuppoſed willing to comply with it. The practice of ſuch a court of judicature, that is, its determination of any queſtions, which have ariſen upon the law, inſtead of being means, which will help to interpret it, are themſelves authentic interpretations of it. Thus far indeed the practice of ſuch a court may be conſidered as a means of interpretation. Though the perſons, who preſide there in later times, may have the ſame authority to interpret a law, that their predeceſſors had; yet what their predeceſſors have done, who were contemporaries with the legiſlator, will help to guide them in the uſe of this authority: becauſe it will ſhew them in what ſenſe the law was underſtood by thoſe, who had the beſt opportunity of knowing the true ſenſe either by adviſing with the legiſlator himſelf, or at leaſt by ſeeing the ſituation of things, which led him to make the law. In like manner the effect, which the law produced in the behaviour of thoſe, who were obliged by it, and who lived at the time of making it, will help us to form a judgment about the meaning of the legiſlator, where his words have left it doubtful: both becauſe they had an opportunity either of finding out the reaſon of the law by their own obſervations, or of hearing it in their diſcourſe with others; and becauſe it is probable, that, if their practice had not been agreeable to the ſenſe of the legiſlator, he would have taken

care

care to correct it by explaning his meaning more preciſely.

A topic, which is much the ſame with one ſort of contemporary practice, may ſometimes be applyed to interpret wills or contracts: though perhaps, when it is thus applyed, it cannot properly be called by the ſame name. In the interpretations of wills we uſually conſider the ſituation of the teſtator; what ſort of perſons he had about him; what their qualities, their conduct, or their characters were; what was his own temper and diſpoſition; what views he had in general; and what views in relation to the perſons, who were about him, in particular. By theſe means we are enabled to form probable conjectures concerning the reaſon of any diſpoſition of his goods, that he has made by his will: and then the reaſon of the diſpoſition aſſiſts us in finding out the meaning of the words, in which it is expreſſed. In like manner, where we are to interpret any ambiguous clauſe in a contract, we attend to the ſituation of the parties, to the inconveniences, which that ſituation laid them under, and to the advantages, which it held out to them; we conſider their temper and character, and examine into every circumſtance, which might probably influence them.

We cannot apply the other ſort of contemporary practice univerſally to the interpretation of wills or of contracts.. Laws operate at a diſtance of time: thoſe, who live many years, after the laws were made, are obliged to act upon them, and are therefore concerned to know their true meaning. But in length of time the meaning of a law may become doubtful, though it was clear and preciſe, when it was firſt made. And ſince by looking back into the contemporary practice, that is, into the

practice,

practice, which the law produced in the firſt inſtance, we may ſee in what ſenſe it was then underſtood; a view of this practice will be a means of removing any doubts about the ſenſe of it, which are owing only to our remoteneſs from its original eſtabliſhment. But the obligation of wills or of contracts is commonly a tranſient one; when they have been once duly acted upon, they have obtained the whole effect, which the teſtator or the contracters had in view. If any doubts therefore ariſe about the meaning of a contract or a will; they commonly ariſe in the firſt inſtance, when there is no practice of paſt times, upon ſuch contract or will, which might help to remove the doubts. But ſometimes things are diſpoſed of by a will or a contract for purpoſes, that are of long continuance: of this ſort are donations in perpetuity for charitable uſes or for other purpoſes of the like ſort. At a remote diſtance of time from the original benefaction, doubts may ariſe upon the words of the will, or of the contract, by which ſuch benefaction is ſettled; either concerning the perſons, who are to diſpoſe of it; or concerning the perſons, who may claim it, or who are capable of holding it; or concerning the reſtrictions, under which it is to be taken or holden. Here is an opportunity of having recourſe to contemporary practice, in the ſame manner, as we have recourſe to this topic in the interpretation of laws. Though any practice, which began ſome time after the firſt ſettlement, will only ſhew their opinion, who began it; and though their opinion is no more to be relyed upon than our own; yet a practice, which began immediately with the benefaction, under the inſpection of the benefactor himſelf, where the donation was made by contract in his life-time, or under the

inſpection of his friends, who lived with him, where the donation was made either by will, or by a contract, which did not take place till after his death; ſuch a practice as this may reaſonably be ſuppoſed to have been agreeable to his meaning.

Strict and large interpretation what.

X. The words —ſtrict or large, when they are applyed to interpretation, are not always uſed in the ſame ſenſe; that is, we do not always mean the ſame thing, when we ſpeak of ſtrict or of large interpretation.

Sometimes common uſage has given two ſenſes to the ſame word, one of which is more confined or includes fewer particulars; and this is called its ſtrict ſenſe; the other is more comprehenſive or includes more particulars; and this is called its large ſenſe. Thus the word—warehouſe—is ſometimes uſed in a large ſenſe to ſignify any place where a dealer in any ſort of goods or wares lays them up, till he wants to bring them out into a place of ſale: and it is likewiſe uſed in a ſtrict ſenſe to ſignify the very place of ſale; and then is no otherwiſe diſtinguiſhed from a ſhop, than as the former is a cloſe and the latter an open place of ſale. When we meet with a word of this ſort in a law, and are doubtful in which of the ſenſes the legiſlator uſed it, we muſt have recourſe to ſome other marks, beſides his words, to aſcertain his meaning. Either of the ſenſes is within the letter of the law: but becauſe other marks muſt be uſed to aſcertain the meaning of the legiſlator, beſides his words, the interpretation is of the mixed ſort. If we take the word in its more confined ſenſe, we are ſaid to interpret it ſtrictly: if we take it in its more comprehenſive ſenſe, we are ſaid to interpret it largely.

Thus far we keep within the letter, whether we interpret the law ſtrictly or largely. But ſtrict and large interpretation

tation are frequently oppoſed to one another in a different ſenſe. The words, of a law may ſometimes expreſs the meaning of the legiſlator imperfectly; they may in their common acceptation include either more or leſs, than was contained in his intention. And as we call it on the one hand ſtrict interpretation, where we contend, that the letter is to be adhered to preciſely; ſo on the other hand we call it large interpretation, where we contend, either that the words ought to be taken in ſuch a ſenſe, as common uſage will not fully juſtify, or that the meaning of the legiſlator is ſomething different from what his words in any uſage would import. What is here called large interpretation, is the ſame, that, in the general diviſion, I have called rational interpretation. And what is here called ſtrict interpretation includes both literal and mixed interpretation: for even mixed interpretation is ſo far literal, that it keeps ſtrictly to the letter, without giving the words any ſenſe, which common uſage has not given them; it only aſcertains the ſenſe, in which the writer uſed the words, when common uſage has given them more ſenſes than one. But perhaps it would be more proper, when literal and mixed interpretation are thus diſtinguiſhed from rational, to call the former cloſe rather than ſtrict interpretation, and to call the latter liberal or free rather than large interpretation. The reaſon, why theſe terms would be the more proper, will appear, if the reader conſiders the different ſorts of rational interpretation. Where we make uſe of rational interpretation; ſometimes we reſtrain the meaning of the writer, ſo as to take in leſs, and ſometimes we extend or enlarge his meaning, ſo as to take in more, than his words expreſs. Now if all rational interpretaton, or all

interpretation, which deviates from the letter, was to be called large interpretation, the conſequence would be, that, when we come to divide rational interpretation into its two ſorts, we muſt ſay, that as one ſort of large interpretation extends or enlarges the writers meaning beyond the letter, ſo the other ſort reſtrains his meaning within the letter. And certainly a large interpretation, which reſtrains his meaning; if it is an intelligible expreſſion, cannot be a very proper one. This impropriety will be avoided, if we call it cloſe interpretation, when we keep cloſe to the letter; and liberal or free interpretation, when we deviate from the letter, or do not confine ourſelves to it. For then all rational interpretation will come under the notion of liberal or free interpretation: and there is nothing either unintelligible or improper in ſaying, that ſuch interpretation, as is free, and does not confine itſelf to the preciſe letter, either reſtrains the meaning of the legiſlator within the letter, or enlarges and extends his meaning beyond the letter.

Meaning of the writer how extended in rational interpretation.

XI. [p] We have juſt now obſerved, that there are two ſorts of purely rational interpretation: ſometimes the meaning of the writer is extended, ſo as to take in more, and ſometimes it is reſtrained, ſo as to take in leſs, than his words import in their common acceptation.

In order to extend the meaning of a writer beyond the preciſe or common ſenſe of his words, we may argue from the reaſon or motive, upon which he proceeded, from the end, which he had in view, or the purpoſe, which he deſigned to obtain. When we thus argue from the reaſon of a law or of a contract or of

[p] Grot. ibid. § XX.

will, and would extend the writers meaning to any caſe, which is not included in his words; Grotius obſerves, that the caſe muſt be ſhewn to come within the ſame reaſon, upon which the lawmaker, or the contracter, or the teſtator, proceeded. If it only comes within a like reaſon; this will be no evidence, that it is included in his meaning. There may be as much reaſon, why ſome other acts, which are not expreſſed in the words of a law, ſhould be forbidden, as there is, why thoſe acts ſhould be forbidden, which are expreſſed in the words of it: but no argument can be drawn from hence to prove, that ſuch other acts are within the meaning of the legiſlator. One reaſon may be like another, or one reaſon may be of equal weight with another: but notwithſtanding their likeneſs or their equality of weight, though one of them was in the mind of the legiſlator, it will be no conſequence, that the other muſt have been in his mind too. And certainly we can never argue, that his meaning ought to be extended beyond his words, upon a reaſon, which does not appear to have been in his mind.

But every writing, and every clauſe in a writing, whether it is a law, or a contract, or a will, though it is not to be conſtrued agreeably to the reaſon, upon which the writer might have proceeded, is certainly to be conſtrued agreeably to the reaſon, upon which he did proceed. When we know what was the reaſon or final cauſe, which the writer had in view, what end he propoſed, or what effect he deſigned to produce; and the meaning of the law, or contract, or will, if we were to adhere cloſely to the words of it, would not come up to this reaſon, or would not produce this effect; we may then conclude that his words expreſs his meaning

imperfectly, and that his meaning is to be extended beyond his words, ſo as to come up to this reaſon, or ſo as to produce this effect. For it is much more probable, that the writer ſhould fail in expreſſing his meaning, than that his meaning ſhould fall ſhort of the purpoſes, which he deſigned to obtain.

Sempronius, who had ſaid in his will, —I make Curius my heir, if the child, with which my wife is now big, ſhould happen to die, — was miſtaken in ſuppoſing his wife to be with child. And as no poſthumous child is born, the heirs in inteſtate ſucceſſion claim the eſtate: becauſe Curius, according to the words of the will, could only claim upon the event of ſuch childs death. But though the words of the conditional cauſe include only this event of the childs death; yet the meaning of it may be extended ſo as to take in the other event of no ſuch childs being born. For it is plane upon the face of the will, that, in the intention of the teſtator, Curius ſtands next to his own child: and conſequently that his reaſon for adding this condition was to make a proviſion for his own child, and not for any one elſe, in preference to Curius. If therefore we make this clauſe operate ſo as to exclude Curius, though there is no poſthumous child to be provided for; we ſhall give it ſuch an operation, as is not agreeable to the intention of the teſtator. His words indeed are —If my poſthumous child dies. But if we interpret his will by the reaſon, upon which he proceeded, his meaning is —If I have no poſthumous child, that lives.

If the law has preſcribed a particular method of recovering poſſeſſion, where the owner of any lands has been turned out of them by force; it may be a queſtion, whether the ſame method is to be made uſe of,

where a number of armed men have taken poſſeſſion of his field in his abſence, who, upon his attempting to come into it, bid him come in at his peril, and he withdraws without perſiſting in his attempt? The words of the law may be urged on one ſide; becauſe he cannot be ſaid to have been turned out of his lands, as he was not upon them. But the reaſon of the law is on the other ſide. The end or deſign of it is, not merely to place him upon his own lands, but to give him poſſeſſion of them. If therefore, where it ſpeaks of his being turned out of his lands, we collect the meaning of it from this purpoſe; his being turned out of his lands, muſt mean, not merely his being put out of the lands themſelves, but his being put out of the poſſeſſion of them. And he is as much put out of poſſeſſion, when he is hindered by force from coming upon them, as if he had been upon them, and had been driven off by force. What the law intends to reſtore him to, is what it ſuppoſes him to have been turned out of. But it intends, not merely to bring him into his lands again, but to bring him into the poſſeſſion of them. When therefore it ſays, —if a man is turned out of his lands; it muſt be underſtood to mean, — if he is turned out of the poſſeſſion of his lands.

[q] The moſaic laws ſays, If a man ſhall open a pit, or if a man ſhall dig a pit, and not cover it, and an ox or an aſs fall therein; the owner of the pit ſhall make it good, and give money unto the owner of them; and the dead beaſt ſhall be his. In our authors opinion the reaſon of the law will extend it, beyond the words, to any ditch or to any tame animal. But this may well be doubted of: becauſe the ſame reaſon does not extend to all ditches and to all tame animals. A ditch

[q] Exod. XXI. 28. &c.

may be intended as a fence for a mans grounds: and the law cannot be ſuppoſed, either to require, that a ditch, when it is made for this purpoſe, ſhould be covered, or to charge the owner of the grounds with the loſs of any beaſt, which falls into ſuch ditch, in attempting to come into a place, where it ought not to be. If the owners of ſheep, in the country where this law was made, were always uſed to have ſhepherds to take care of them; there is not the ſame reaſon, why the owner of a pit ſhould be charged with the loſs of a ſheep, which falls into it, that there is, why he ſhould be charged with the loſs of any other tame animals, which uſually ſtray without a keeper.

Meaning of the writer how reſtrained in rational interpretation.

XII. [r] When we would reſtrain the meaning of a writer, and ſhew, that it is leſs comprehenſive than his words, or that ſome particular caſe, which is included in his words, is not within his meaning; we muſt argue, either for an original or for an accidental defect in his intention; either we muſt argue, that according to the ſtate of things, which came within the notice of the lawmaker, or teſtator, or contracter, at the time of making the law, or the will, or the contract, he could not intend originally to include the caſe in queſtion, however he may have ſo failed in his expreſſion as to include it in his words; or elſe we muſt argue, that the caſe is an accidental one, which probably was not foreſeen originally, and that, if the writer had foreſeen it, if the preſent ſtate of things had come within his notice, he would have limited his expreſſion, and have particularly excepted the caſe in queſtion.

In contending for an original defect in the meaning of the writer, the topics are the ſame with thoſe, which

[r] Grot. ibid. § XXII.—XXIX.

we

we make uſe of in mixed interpretation; we argue from the effect, from the matter, or from the circumſtances. Under the firſt of theſe topics may be comprehended what Grotius conſiders as a diſtinct topic, and calls the reaſon or ultimate deſign of the writer. For when we argue, that a particular caſe could not originally be included in the meaning of the law; either becauſe ſome abſurd conſequence will follow from including it, or becauſe ſome conſequence will follow, which is inconſiſtent with the reaſon or end of the law; we plainely argue in both inſtances from the effect: in the former inſtance we contend, that the effect, which would be produced, by including the caſe in the meaning of the law, will be contrary to reaſon in general; and in the latter we contend, that it would be contrary to the reaſon of the legiſlator in particular. Our Saviour proves from the reaſon of the law, that the fourth commandment, which preſcribes the obſervance of the ſabbath, admits of ſome exceptions, though the words of the law are general. When he reaſons from the practice of the jews themſelves, who upon that day led their beaſts to water; his argument may ſeem to conclude in favour only of works of neceſſity: but when he reaſons from the end of the law, that the ſabbath was made for man and not man for the ſabbath; the concluſion is more comprehenſive, and takes in all works of pure charity.

The law ſays, that they, who in a ſtorm forſake the ſhip, ſhall loſe their right in the ſhip and the lading; and that ſuch ſhip and lading ſhall be the property of them, who ſtay in it. A ſhip is quitted in a ſtorm by all, who were in it, except one ſick man, who was not able to get out; and the ſhip by accident comes ſafe into port. The ſick man claims the ſhip as his own by the

the law, and the owners claim againſt him. Puffendorf makes uſe of this as an example of mixed interpretation, where the particular ſenſe, in which words of more ſenſes than one are uſed, is to be aſcertained. But it ſeems rather to be an example of rational interpretation, where the writers words expreſs his meaning imperfectly, and the ſenſe of them being too general is to be reſtrained by the end, which he had in view. Staying in the ſhip are words, which if we adhere to the letter, have only one ſenſe: but this ſenſe is very extenſive and would ſupport the ſick mans claim. The reaſon of the law, or the encouragement, which the legiſlator deſigned to give thoſe, who would expoſe their lives to ſave the ſhip, is what limits this extenſive ſenſe of the words, and ſhews the legiſlator to have meant, not any ſtaying in the ſhip, as his words, unleſs we were thus to reſtrain them by the reaſon of the law, would import, but a voluntary ſtaying there for the purpoſe of contributing to ſave it.

Whatever caſe is not within the ſubject-matter of what is ſpoken or written is not within the meaning of the ſpeaker or writer; though his words, if they were conſtrued in their full extent, would include it: for nothing can be within his meaning, which was not in his mind; and the ſubject-matter, upon which he ſpoke or wrote, is what his mind was employed about, at the time of ſpeaking or writing. You ſell me goods, and oblige yourſelf to defend me in the poſſeſſion of them, under a certain penalty. If theſe goods are taken from me by force, and you refuſe, upon my requeſt, to defend me againſt ſuch force, I have no claim to the penalty. By engaging to defend me in the poſſeſſion of the goods, you could not mean to enſure my poſſeſſion

againſt

againſt ſuch accidents as theſe. For though the words have this extenſive ſenſe; yet the ſubject-matter of the agreement limits the ſenſe of them. In a contract, which transfers your right in the goods to me, this right is the ſubject-matter. Any loſs of poſſeſſion therefore, in which this right never came into queſtion, as it has no relation to the ſubject matter of the contract, could not originally be included within your meaning.

The circumſtances, by which the meaning of a law is ſo reſtrained by rational interpretation, as to exclude caſes, which are contained within the letter of it, are of the ſame ſort, with thoſe, which are made uſe of to ſettle the ſenſe of an ambiguous word in mixed interpretation: they are ſuch as are connected with it either in origin, or in place, or in time. Other laws, which were made by the ſame legiſlator, or ſome clauſes in the ſame law, or the contemporary practice, by which is meant either the practice, which obtained at the time of making the law, and which the law was deſigned to prevent, or the practice, which followed upon making it, among thoſe, who were under its authority and were in all appearance diſpoſed to comply with it; any or all of theſe are circumſtances, which will help to ſhew, whether the meaning of the legiſlator was as extenſive as his words; or whether any caſes are to be excepted out of his meaning, which come within his words.

The arguments, which are drawn from theſe topics, ſometimes conclude ſo ſtrongly, that little can be ſaid againſt them with any appearance of reaſon. But ſometimes they may be ſo urged on both ſides, as to leave room to doubt, on which ſide the truth lies. [a] Thus,

[a] Puffend. B. V. C. XII. § XIII. 5.

where

where the law forbids or commands any thing in general words, and then goes on to enumerate the ſeveral particulars, which are included under ſuch general words; if it omits any one particular, it may be a queſtion, whether the meaning of the legiſlator extended to this particular or not. Now this enumeration of particulars being a circumſtance, which is connected in place with the general words; as they are both found in the ſame law; we may urge, that it was deſigned to explane the general words, and to ſhew how far the legiſlator intended to extend them, that, when he was enumerating the ſeveral particulars, if he had intended to take in any others, beſides what he has expreſſed, he would have mentioned them, as well as theſe; and conſequently that, however extenſive the general words of the law may be in themſelves, the meaning of the legiſlator muſt be limited to theſe particulars, which are contained in ſuch enumeration. On the contrary, we might argue from the effect, according to the rules of mixed interpretation; that, if any doubt concerning the legiſlators meaning ariſes upon his words, we are to conſtrue all his words in ſuch a manner, as to give them ſome ſignificancy and to make them produce ſome effect. But if no particulars are to be included within his meaning, beſides thoſe, which are expreſſed in the enumeration, his general words would ſtand for nothing, and no effect would be produced by them. This argument will conclude moſt ſtrongly, where the general words follow the enumeration. When the legiſlator begins his command or his prohibition with general words, and then goes on to enumerate particulars; there is ſome ground for ſurmiſing, that the enumeration of particulars is deſigned to be explanatory of the general words, and that his meaning ſtops, where

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he ſtops in his enumeration. But if he firſt mentions a number of particulars, which he commands or forbids, and then concludes with ſuch general words, as will extend in their common acceptation to ſome other particulars not expreſsly mentioned; it ſeems to be a more reaſonable ſuppoſition, that he apprehended it to be poſſible for him to have overlooked ſeveral particulars, which he intended to include within the law, and that he added theſe general words with a deſign to take in all ſuch particulars, as he might have overlooked. And even where the general words ſtand firſt, though the enumeration of particulars, which follows them, muſt be allowed to be explanatory of ſuch general words; yet there is no neceſſity for ſuppoſing, that the meaning of the legiſlator extends no farther than the particulars, which he enumerates. He might deſign to explane, not the extent of the law, but the matter of it, to ſhew, not what number of caſes, but what ſort of caſes, was within his meaning. Now a few inſtances would be ſufficient to explane the matter of his law and to ſhew what ſort of caſes come within the meaning of it. He might therefore leave his enumeration imperfect; not becauſe his meaning ſtopped, where he ſtopped in his enumeration; but becauſe ſuch an imperfect enumeration would anſwer the purpoſe, for which he deſigned it. [m] The law of Moſes commanded, that three cities ſhould be ſet apart in the midſt of the land, that every ſlayer might flee thither. And this is the caſe of the ſlayer, which ſhall flee thither, that he may live: whoſo killeth his neighbour ignorantly, whom he hated not in time paſt. Thus far it is planely the intention of the lawmaker that every perſon, who killed another in any manner, if there was no malice, ſhould ſuffer no puniſhment,

[m] Deut. XIX. 3. 4. 5.

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provided he took refuge in one of thoſe cities of protection. But the law, after it has ſaid this in general words, proceeds to mention a particular inſtance. As when a man goeth into the wood with his neighbour to hew wood; and his hand fetcheth a ſtroke with the ax to cut down the tree; and the head ſlippeth from the helve, and lighteth upon his neighbour, that he die; he ſhall flee unto one of theſe cities, and live. One can ſcarce imagine, that the legiſlator mentioned this particular caſe with a deſign of limiting his meaning to this caſe only. He did indeed deſign, that it ſhould be explanatory of his general words: but then he deſigned to explane by it, not the extent, but the matter of the law, to ſhew what ſort of caſes, and not what number of caſes, his meaning took in. But we ſhould obſerve in the mean time, that the force of this argument is greatly abated, where the law, inſtead of contenting itſelf with mentioning a few caſes, mentions a great number. The more perfect the enumeration is, the more likelihood there is, that the legiſlator deſigned to limit his meaning to the particulars, which are enumerated. If he only deſigned to explane the matter of his law, or to point out the ſort of caſes, to which it belongs; a few particulars would be ſufficient for this purpoſe. When therefore he enumerates many, it becomes likely, that he did not deſign to anſwer a purpoſe, which might have been anſwered with leſs trouble; but that he deſigned to mention all the particulars, to which the meaning of the law extends. What is thus urged in abatement, though it may have weight, where the enumeration of particulars follows the general words, will, for a reaſon, which has already been taken notice of, have little or no weight, where the general words follow the enumeration of particulars.

Many

Many more examples of the like ſort might be produced: but this, which we have been explaning, will be ſufficient to ſhew the reader, that the common topics of interpretation may frequently be alledged on both ſides with ſuch an appearance of probability, as will make it difficult to come to any certain concluſion on either.

Sometimes a caſe is to be excepted out of the meaning of a writer, though no original defect of his intention can be ſhewn. The ſtate of things, which fell under the notice of the legiſlator, at the time of making the law, may poſſibly afford no evidence, that he did not intend from the beginning to include the caſe in queſtion within the obligation of the law; whether we were to argue from the effects, from the matter, or from the circumſtances. We muſt then have recourſe to the preſent ſtate of things, and muſt endeavour to prove, that the law is more extenſive, than the legiſlator would have made it, if he had foreſeen the accidents, which have happened ſince it was made; that it was adapted to the ſtate of things, which he had before him; but that the preſent ſtate of them in this particular inſtance is ſuch, as makes it reaſonable to believe, that, if he had been aware of it, he would have either expreſsly excepted the caſe in queſtion out of the law, or would have otherwiſe provided for it.

The like method of reaſoning may likewiſe be applyed to wills and to contracts. Though the words of the will, or of the contract, may include the caſe in queſtion, and though no original defect may appear in the intention of the teſtator or of the contracters, which might exempt this caſe from the general obligation produced by the will, or the contract; yet we may

may argue, that the reaſon, why no ſuch defect ap-
pears, is, becauſe the teſtator or the contracter pro-
ceeded upon the ſtate of things, which was then before
him; and that, if he had been aware of what might
ariſe afterwards, if he had ſeen things in the ſame ſtate
in which by accident they are now placed, he would
have added ſome clauſe in favour of the caſe now in
queſtion.

Great caution is neceſſary, when we thus put our-
ſelves into the place of the lawmaker, or teſtator, or
contracter, and undertake to determine what they
would do, if they were to declare their own meaning
in a caſe, upon which they have not already declared
it. There will otherwiſe be ſome danger of our over-
ruling their act and ſetting it aſide, under the notion
of declaring what they would chuſe to have done upon
it. The proper qualifications for ſuch an hazardous un-
dertaking are an exact knowledge of equity, and a firm
reſolution, as well as a ſincere inclination, of determin-
ing according to it. For whatever grounds there may
be to preſume, that the lawmaker, or the teſtator, or
the contracter, would be diſpoſed to except any caſe
if it is equitable, that ſuch caſe ſhould be excepted;
yet we ſhall be unqualifyed to act upon this preſump-
tion, or to determine what caſes are to be excepted up-
on this principle; unleſs we know what is equitable.
Nor will our knowledge alone make us fit to judge
about the mind or intention of others, where they have
not declared or ſignifyed it in words; if we are either
corrupt or timid: though we know what equity would
dictate, we ſhall probably determine contrary to its di-
ctates; if we are liable either to be byaſſed by intereſt, or
affection, or to be over-awed by threatenings. By equity is
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here meant a fair and honeſt correction of a law, or a will, or a contract; where it appears, that the lawmaker, or the teſtator, or the parties in the contract, either would or ought to conſent to ſuch a correction, if they were to interpret their own act.

Under this head of interpretation, we argue, either that the accidental caſe in queſtion ought in reaſon to be excepted, or elſe that it muſt of neceſſity be excepted, out of the law, or the will, or the contract; though the writer has neither added, nor intimated any exception in favour of it.

When we argue, that an accidental caſe ought in reaſon to be excepted; the principal topic is the hardſhip, which muſt be ſuffered, if it is not excepted. It is unjuſt to bring any evil upon a man, and unreaſonable to deprive him of any benefit, where no good at all will be produced, or even where no ſuch good will be produced, as is of equal importance with the evil, that he ſuffers, or with the benefit, that he loſes. Since therefore the lawmaker, or the teſtator, or the parties contracting, may be preſumed not to have intended, becauſe they ought not to have intended, any thing, which is unjuſt or unreaſonable; we may conclude, that any caſe is to be excepted out of a law, or a will, or a contract, in which, if it was not excepted, a man muſt either ſuffer ſome great evil, or be deprived of ſome great benefit, either for no good purpoſe at all, or for a purpoſe, which, though it may be a good one, is of leſs importance, than the evil, which he is to undergo.

Cicero mentions a caſe, ariſing upon a law of the Rhodians, as an example of ſuch equitable interpretation. The law ſays, that any ſhip of force, which comes into any of their ports, ſhall be confiſcated. A ſtorm

drives a ſhip of force into one of their ports, notwithſtanding all the endeavours of the ſailors to prevent it. The officers of the ſtate claim the ſhip as confiſcated by the law. But however ſuch a claim may be ſupported by the letter, it cannot be ſupported by the equity of the law. The legiſlator may have made no expreſs exception in favour of ſuch a caſe: but it is to be preſumed, that he never deſigned what was unjuſt or unreaſonable; and conſequently that he would have excepted it, if he had foreſeen ſuch a caſe, wherein a grievous hardſhip may be ſuffered for no purpoſe at all. And certainly no purpoſe can be anſwered by puniſhing thoſe, who have broken the law againſt their wills; becauſe where there is no diſpoſition to offend, there is no future danger to be guarded againſt.

Grotius here excepts againſt a rule, which Cicero has laid down, that ſuch a promiſe is not to be performed, as brings more damage to the promiſer than benefit to the perſon, to whom the promiſe was made. For the promiſer is not at liberty or has no right to judge concerning the benefit, which would ariſe to the other party from his performance. Thus far however Ciceros rule may be admitted. Though the promiſer is not at liberty to determine concerning the benefit, which would ariſe to another from his performance, and conſequently cannot releaſe himſelf from his own obligation; yet in civil ſociety, where there is an authorized judge between them, ſuch judge may proceed upon this rule, and may determine, that the perſon, to whom the promiſe is made, ought in equity to releaſe the promiſer; if he finds, that any unforeſeen hardſhip would ariſe from performance; and particularly if it appears, that by means of ſome acci-

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dental change, which has happened in the ſtate of affairs, ſince the time of making the promiſe, performance will be attended with more harm on one ſide, than benefit on the other.

It may not only be reaſonable, but neceſſary, to except an accidental caſe out of a law or a contract; though there does not appear to have been any original defect in the intention of the lawmaker or of the parties contracting, that is, though they cannot be ſhewn to have deſigned from the beginning to except that caſe. The general tenor of a law or a contract may be conſiſtent with the law of nature: and yet ſuch caſes may ariſe accidentally, as will render it impoſſible to comply with the law, or to perform the contract, without tranſgreſſing the law of nature. It is neceſſary to except ſuch caſes, as theſe, when they happen to ariſe; whether the legiſlator or the contracters originally excepted them or not. For the legiſlator, as he has no power to oblige others, and the contracters, as they have no power to oblige themſelves, to act inconſiſtently with the law of nature, certainly ought, and may therefore reaſonably be preſumed willing, to except them. Grotius explanes his meaning by the inſtance of a charge, which is a contract of the beneficial ſort, and obliges the perſon, who receives any goods into his cuſtody, to keep them ſafe, and to return them, either upon demand or at the time agreed upon, to thoſe, from whom he received them. But if goods are thus left in charge with me, and before they are demanded by thoſe, who left them with me, it appears, that they had ſtolen the goods, and the true owner demands them of me; the obligation of my contract, by this accident, becomes inconſiſtent with the obligation of the law of nature, which ariſes from the owners property. And this exception, though

though it was not expreſſed in the contract, muſt be allowed of, when the caſe happens: becauſe I ought not, or rather had not power, to bind myſelf to do what the law of nature has forbidden.

Where two civil laws, which come from the ſame legiſlator, relate to the ſame ſubject-matter, and are contrary to one another; ſo that both of them cannot be complyed with at any one time or place, or in any circumſtances; the rule is, that the latter of theſe laws repeals the former. The legiſlator could not at one and the ſame time intend contrarieties. But when he eſtabliſhed the ſecond law, he intended, that it ſhould be complyed with: and conſequently he muſt then intend to over-rule the other. In like manner, where two contracts, which are entered into at different times, are in all reſpects inconſiſtent with one another; ſo that the obligations of both theſe contracts cannot ſubſiſt together; the contracters are underſtood by the latter of them to releaſe each other from the obligation of the former. As their joynt will or conſent produced the obligation of the former contract; ſo they can by a like joynt act deſtroy this effect, or ſet the obligation aſide. But by entering into the ſecond contract they ſhew, that it is then their will to bind themſelves to what is contained in this ſecond contract; and conſequently, whatever obligation they might have laid themſelves under by the firſt contract, it muſt then be their will to ſet this obligation aſide, or to releaſe one another from it. They cannot be ſuppoſed to will contrarieties; they cannot therefore intend to produce a ſecond obligation, without intending at the ſame time to ſet aſide the firſt, which, if it ſubſiſted, would make the ſecond impoſſible.

What is here affirmed concerning contracts, that

ſubſequent contract will make an antecedent one void, may be eaſily reconciled with what has been affirmed in another [m] place, concerning promiſes and obligatory acts in general, that any ſubſequent promiſe, which is contrary to one, that was formerly made, cannot make the former void. For here we are ſpeaking of what may be done by the joynt act of all the parties in a contract; whereas we were there ſpeaking of what one of the parties in a promiſe or a contract might do by his own act. An obligation, which is produced by the joynt will of two or more perſons, cannot be deſtroyed by the ſingle will of any one of them. If therefore two or more perſons have bound themſelves to one another by a contract, any other contract, which is made for a contrary purpoſe between any one of thoſe perſons and ſome one elſe, who was no party in the former, will be void. The former obligation ſtill ſubſiſts, becauſe his ſingle act could not ſet it aſide. And as long as it ſubſiſts, he has no moral power of binding himſelf to any thing, which is inconſiſtent with it. But if all, who were parties in the former contract, are likewiſe parties in the ſubſequent one; their joynt act of binding themſelves to one another by this ſubſequent contract will make the former void. Though one of them by his own will cannot releaſe himſelf; yet their joynt conſent is ſufficient to releaſe one another from the former obligation: and by this ſubſequent contract, in which they are all parties, they are underſtood to give ſuch joynt conſent.

But there may be ſuch an accidental ſituation of things, or ſuch an unforeſeen event may happen, as will render it impoſſible in ſome particular caſe to comply with two laws or two contracts, which in their general tenor are conſiſtent with one another, and may

[m] See B. I. C. XII. § IX.

well ſubſiſt together. One of theſe laws will not repeal the other, or one of theſe contracts will not make the other void in general: becauſe by the ſuppoſition they are conſiſtent with one another. But this particular caſe, which was not foreſeen, and therefore was not provided againſt, muſt, when it ariſes, be of neceſſity excepted out of the obligation of one of the laws or one of the contracts; becauſe they cannot both be complyed with. The queſtion here will be, which of the two laws, or of the two contracts, is to give way to the other? the caſe muſt neceſſarily be excepted out of the obligation of one of them; which of them therefore will moſt reaſonably or moſt conſiſtently with the intention of the lawmaker, or of the contracters, admit of the exception? Where two laws or two contracts are contrary to one another in all reſpects, we ſay, that the latter makes the former void: becauſe the lawmaker or the contracters could not intend the obligation of the latter without intending at the ſame time to ſet the obligation of the former aſide. But where they are in general conſiſtent with one another from the beginning, and interfere only in ſome particular caſe and by ſome unforeſeen accident; the lawmaker or the contracters may well be underſtood to have intended from the beginning, that both of them ſhould be obſerved.

In determining which law or which contract is to be obſerved, where two laws or two contracts accidentally interfere; Grotius ſays, that the latter, is to be obſerved in preference to the former. But then he propoſes this as a rule, which is only to be applyed, when all others fail, or when all other circumſtances are equal; ſo that the point could not be ſettled without the help of this rule. The other rules, which he lays down for this purpoſe, are theſe, which follow.

Firſt;

First; a law, which only permits, muſt give way to a law, which commands or forbids. For a permiſſion is only a check upon the operation of that law, which grants the permiſſion, and not upon the operation of this other law, which happens to interfere with it.

Secondly, a law, which may be complyed with at any time, muſt give way to a law, which, if it is not complyed with now, cannot be complyed with at all. When ſome of our Saviours diſciples were diſpleaſed with the woman, who had poured a box of precious ointment on his head, which, as they urged, might have been ſold for much and given to the poor; he defends her upon this principle. Jeſus ſaid, let her alone, why trouble ye her? ſhe hath wrought a good work on me: for ye have the poor with you always, and whenſoever ye will, ye may do them good; but me ye have not always. The reaſonableneſs of this rule is evident. By holding the conduct, which it recommends, we may ſatisfy both the laws, one of them now, and the other at ſome future opportunity, when they do not interfere. Whereas by the contrary conduct we can only ſatisfy one of them: if at preſent we act in compliance with that, which might have been complyed with at any time, we loſe the only opportunity of complying with the other.

Thirdly; Grotius deduces it as a conſequence from the rule laſt mentioned, that a negative law, or a law, which forbids, is commonly to be obſerved in preference to an affirmative law, or to a law, which commands; when they happen to interfere with one another. A negative law obliges at all times, at the preſent as well as at any future opportunity: ſo that if it is not complyed with now, no future compliance will ſatisfy for

the preſent violation of it. But an affimative law is underſtood then only to oblige, when there is a convenient opportunity of doing what it commands: and certainly it is not a convenient opportunity, when we cannot do what this law commands without doing what another law forbids. Our author has very rightly limited this rule, by ſpeaking of it as a rule, which commonly holds good. But Puffendorf unadviſedly delivers it in general terms, as if it was univerſally true, and admitted of no exception, or required no limitation. And yet when one law ſays, that no woman ſhall have her ſtatue placed in the gymnaſium; and another ſays, that whoever kills a tyrant ſhall have a ſtatue in the gymnaſium; he determines, that if a woman had killed a tyrant, her ſtatue ſhould be placed there: notwithſtanding this determination makes a negative law give way to an affirmative one. He judges in favour of the woman; becauſe by following that law, upon which ſhe claims a ſtatue, more benefit may ariſe to the public, than by following the other. The reaſon of one of theſe laws was, that the youth, who were trained up to valour in the gymnaſium, by ſeeing thoſe, who had freed their country from ſlavery, rewarded with the honour of a ſtatue, might be incited to imitate their bravery. The reaſon of the other law was, that the virtues of women are not generally the object of their imitation, who are to be trained up to valour. And from hence he concludes, that, ſince a woman has outdone her ſex, ſhe the rather ought to have her ſtatue put up in the gymnaſium; becauſe ſuch valour in a woman would be a greater incitement to emulation in the men. I do not queſtion the juſtneſs either of the rule, upon which he proceeds, or of the deter-

determination, which he deduces from it. My only reaſon for mentioning this determination here is, that it ſhews the rule, which is now before us, not to be ſo univerſally true, as he ſeems to ſuppoſe it.

Fourthly; when two laws interfere, if they are equal in other reſpects, that, which is more particular, takes place of that, which is more general. The principal reaſon, which ſupports this rule, ſeems to be, that the legiſlator, where he ſpeaks particularly and exactly, appears to be more careful to guard againſt all exceptions, which might ariſe accidentally, and may therefore be thought more unwilling to admit of any, than where he ſpeaks in general and at large.

Fifthly; a law, which is eſtabliſhed upon a penalty, is to be obſerved in preference to a law, which has no penalty annexed; if they happen to interfere. This is not deſigned as a rule of prudence directing a perſon, when he is in doubt which of the two laws he ſhould obey, to take the ſafer part and to comply with the penal law, that he may avoid the penalty. For where two laws interfere, the queſtion is, which of the two the legiſlator would chuſe to have him comply with; and when this queſtion is rightly determined, the other law does not oblige him. From whence it follows, that if any reaſon could be given, why the legiſlator would chuſe to have him obey the other law, rather than the penal one; it would be as prudent to hold this conduct, as the contrary: becauſe upon this ſuppoſition, the penal law would not oblige him; and conſequently by this conduct, as well as by the contrary, he might avoid the penalty. But the penalty, though it is not to be conſidered as a prudential reaſon, why the penal law ſhould be obeyed, rather than

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the other, is a reaſon, why we ſhould preſume, that the legiſlator would rather chuſe to have this law obeyed: becauſe from his taking care to guard this law more ſtrongly, we may conclude, that he thought it of more importance, than the other.

Sixthly; if both the laws are penal, the preference is to be given to that, which is eſtabliſhed upon the higher penalty. We cannot well ſupport this rule by the maxim, which is generally applyed in doubtful caſes, that of two evils the leaſt is to be choſen. In this maxim by an evil muſt be meant either a moral or a natural evil, that is, either an evil, which we are to do, or an evil, which we are to ſuffer. Now if we underſtand the maxim in the former ſenſe, which is the true one; it will only amount to this; where we muſt do wrong either way, it is beſt to follow that courſe, in which we ſhall do the leaſt wrong. But in this ſenſe the maxim is ſo far from ſupporting the rule here laid down, that, where two laws interfere, and we are in doubt which is to be obeyed, it will afford us no help at all towards removing the doubt. For when we are in this ſituation, the very queſtion is, whether we ſhall do the leſs evil by diſobeying this or by diſobeying that law: and conſequently to ſay here, that out of two evils we ſhould chuſe the leaſt, cannot help to remove this doubt: becauſe this maxim, ſince it contains nothing, but what is contained in the queſtion, upon which we doubt, leaves the queſtion juſt where it was. But if we take the maxim in the other ſenſe, and conſider it merely as a maxim of prudence, which directs us, where out of two evils we muſt ſuffer one, to follow that courſe, which will make us ſuffer the leaſt, it is not applicable to the point, which is now before

before us: becauſe it ſuppoſes, that, whatever courſe we follow, we muſt ſuffer the penalty of one of the laws. Whereas, when two laws interfere, and it is impoſſible to obey both of them; if we chuſe rightly, that is, if we obey the law, which the legiſlator would in ſuch a caſe chuſe to have us obey, we ſhall avoid both the penalties. We comply with one of the laws, and therefore ſtand clear of the penalty, upon which it is eſtabliſhed. And though we diſobey the other, we cannot juſtly be puniſhed for diſobeying it; becauſe whilſt we comply with that, it was impoſſible for us to comply with this. But the rule, which directs us, where two laws interfere, to give the preference to that, which is eſtabliſhed upon the higher penalty, though it is not ſupported by the maxim, that out of two evils the leaſt is to be choſen, may be ſupported by the ſame reaſon with the rule, which was laſt mentioned. The legiſlator has guarded that law the moſt carefully, which he has eſtabliſhed upon the higher penalty: from whence we may preſume, that he looked upon that, as the law of the more importance, and conſequently that he would chuſe to have us comply with that, if by any accident it becomes impoſſible for us to comply with both.

Seventhly; where two laws interfere, we ſhould follow that, which is recommended by the moſt honeſt or the moſt beneficial reaſons. The queſtion concerning the womans claim to have her ſtatue in the gymnaſium, is determined in her favour by Puffendorf: becauſe the law, which gives her this claim, is recommended by a more beneficial reaſon, than the other law, which oppoſes her claim. Another queſtion, which has already been mentioned, where the ſame law by accident

accident interferes with itſelf, may be determined by comparing the honeſty or juſtice of the reaſons on both ſides. Where two women had been raviſhed by the ſame man; and the law gave any woman, who had been thus injured, her option, that the man ſhould either be put to death or be compelled to marry her; one of them claimed to have him put to death, and and the other claimed to have him in marriage. She, who claims to marry him, would loſe her huſband, if he was put to death: whereas ſhe, who claims to have him put to death, does not properly loſe any thing by his marrying the other. The claim therefore of the former ſeems to be recommended by a more honeſt and juſt reaſon, than the claim of the latter.

Scarce any laws but what will naturally admit of rational interpretation.

XIII. There are ſcarce any laws, but what will naturally admit of rational or liberal interpretation, that is, either of being ſo enlarged, as to take ſome caſes into the meaning of the law, which are not contained in the letter, or of being ſo reſtrained as to exclude ſome caſes out of the meaning, which are contained in the letter. For the intention of the legiſlator is the natural meaſure of the extent of the law, whether that intention is collected from his words alone by literal interpretation, or from his words and ſome other ſigns by mixed interpretation, or from ſuch other ſigns alone by rational interpretation. In like manner wills and contracts naturally admit of being interpreted rationally, of being ſo enlarged, as to extend beyond the letter, or of being ſo reſtrained, as to fall ſhort of it; becauſe the intention of the teſtator or of the parties contracting, as far as it is known, is the natural meaſure of the claim ariſing from theſe acts; whether that intention appears planely in their words; or is aſcer-

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tained by the help of ſome other ſigns and of their words taken together, when their words leave it doubtful; or is collected from ſuch other ſigns alone, when their words do not expreſs it perfectly.

The deſign of the legiſlator, in ſome civil laws, or in ſome clauſes of them, is indeed confined to his words: and where it is ſo confined, nothing can either be taken into the meaning of the law, or be left out of it by rational interpretation. The deſign of an explanatory law is to explane by words the meaning of the legiſlator in ſome antecedent law, which was expreſſed ambiguouſly or imperfectly. An explanatory law therefore will not admit of rational interpretation: as the deſign of the law is confined to the words of it, we muſt look for the meaning of it in the words only. For the ſame reaſon all definitions in a law are to be interpreted cloſely: they are neither to be enlarged to any thing more, nor to be reſtrained to any thing leſs, than the words expreſs. The legiſlator deſigns in ſuch definition to explane by his words the term, which he defines: whatever therefore is more than theſe words expreſs, is not within the deſign of the legiſlator; and whatever is leſs, falls ſhort of his deſign.

But either an explanatory law, which has reference to ſome antecedent law, or a definition in a law, which has reference to ſome term made uſe of in the ſame law, though they do not admit of rational or free interpretation, may poſſibly be ambiguous: and when they are, we muſt aſcertain the meaning of the legiſlator by mixed interpretation. If the ambiguity in theſe laws ariſes, as it frequently does in other laws, from a word or a ſentence, which will admit either of a more

more extenſive or of a more confined ſenſe; we muſt have recourſe to the topics of mixed interpretation to determine in which of theſe two ſenſes ſuch word or ſuch ſentence was uſed by the legiſlator. For though explanatory laws are to be interpreted cloſely, and will not admit of any meaning, but what is contained and expreſſed in the words of them; yet no argument can be drawn from the nature of ſuch laws, to prove, that, where the words themſelves admit both of a ſtrict and of a large ſenſe, we muſt neceſſarily adhere to the former. We muſt indeed keep to the letter of the law: but there is no natural reaſon, why we muſt follow the narroweſt and moſt confined ſenſe, that the letter of the law is capable of.

Rational interpretation, both ſuch as enlarges the meaning of the writer beyond his words, and ſuch as reſtrains it to a leſs extent than what his words import, may be expreſsly precluded by ſome poſitive declaration of the writer himſelf. If the lawmaker, or the contracters, or the teſtator have directed that the law, or the contract, or the will, ſhall be conſtrued according to the literal and grammatical ſenſe of the words; this direction is a bar to all interpretation, which is purely rational: it ſhews, that the intention of the writer came fully up to his words, and went no farther; and conſequently that whatever meaning we give to the writing, which either falls ſhort of the words or goes beyond them, ſuch meaning is not agreeable to his intention. But though a declaration of this ſort precludes all interpretation, which is purely rational, and obliges us to interpret the writing ſtrictly or rather cloſely, that is, to adhere, in our interpretation of it, preciſely to the words; yet if the words themſelves are ambiguous,

ambiguous, if in their literal and grammatical conſtruction they will admit of more ſenſes than one, we may, notwithſtanding ſuch declaration, have recourſe to mixed interpretation, and may argue from rational conjectures to determine, in which of theſe ſeveral ſenſes the writer uſed them. For mixed interpretation is not inconſiſtent with the writers declaration: becauſe this ſort of interpretation, whilſt it proceeds upon rational conjectures, keeps to the literal and grammatical ſenſe of the words. Now amongſt other cauſes of ambiguity, one is, that the words of a writing, in the common acceptation of them, are ſometimes uſed in a more narrow and ſometimes in a more comprehenſive ſenſe. And ſince either of theſe ſenſes may be called a literal and grammatical ſenſe; becauſe both of them are equally authorized by common uſage; the conſequence is, that, though the writer has required us in our interpretation to adhere to the literal and grammatical ſenſe, there is no more reaſon, upon account of what he has ſaid about this matter, to adhere rather to the narrow or ſtrict ſenſe, than to follow the comprehenſive or large ſenſe: notwithſtanding his direction about following the literal and grammatical ſenſe, we muſt make uſe of probable conjectures drawn from other topics, beſides his words, to determine in which of the literal and grammatical ſenſes he uſed the words, whether in their narrow and ſtrict ſenſe, or in their comprehenſive and large ſenſe. Thus a declaration or direction of this ſort, though it obliges us to interpret the writing ſtrictly, in one ſenſe of the word — ſtrictly, does not oblige us to interpret it ſtrictly in another ſenſe of the ſame word: it obliges us to keep ſtrictly to the words of the writing without deviating from them, either ſo as to leave any thing out

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of his meaning, which the words expreſs, or ſo as to take any thing into his meaning, which they do not expreſs. But it does not oblige us, whilſt we keep ſtrictly to the words, to follow the moſt narrow or the ſtrict ſenſe of thoſe words: it leaves us at liberty to follow either this ſenſe, or the more comprehenſive and large ſenſe, according to what we find by rational conjectures to have been moſt probably his meaning.

If there are any other civil laws, in which we are not allowed to make uſe of rational interpretation, beſides ſuch, as are merely explanatory, that is, if in the interpretation of any other laws, beſides theſe, we are not allowed to take either more or leſs into the meaning of them, than what the words expreſs; this reſtraint ariſes not from the nature of the laws themſelves, but from ſome poſitive inſtitution. And this poſitive inſtitution may either be contained in the particular law, which will not admit of rational interpretation, as we have juſt now obſerved, that it is, where the legiſlator directs us to follow the literal and grammatical ſenſe of the words; or elſe it may be introduced by a general law, which has been made concerning interpretation by the civil legiſlator of the ſociety, to which we belong. For the rules of interpretation are under the authority of the civil legiſlator, and are therefore to be applyed in ſuch a manner, and upon ſuch occaſions, as he ſhall preſcribe, in view to the general benefit, either by a written law, or by uſage and cuſtom; the former of which is an expreſs act, and the latter is a tacit act of his authority.

In like manner, where any words or ſentences in a law or a contract, have two ſenſes in common acceptation, one of which is more confined, and the other more

more comprehenſive; there is not any particular ſort of laws or contracts, which will naturally require ſuch ambiguous words or ſentences to be taken in the more confined ſenſe; nor is there on the contrary any particular ſort, which will naturally require them to be taken in the more comprehenſive ſenſe. The intention of the legiſlator is the natural meaſure of the obligation ariſing from the law; and the intention of the parties contracting is the natural meaſure of the claim ariſing from the contract. This intention is to be collected from the ſame topics of interpretation in laws and contracts of all ſorts: unleſs the civil legiſlator of the ſociety, in which the law is made, or to which the contracters belong, has expreſsly preſcribed ſome particular rules of interpretation, or ſome particular method of applying the rules ſuggeſted by natural reaſon; or unleſs ſuch particular rules or ſuch particular method of application have been introduced and eſtabliſhed by long and uninterrupted uſage, which has the ſame effect, as if the civil legiſlator had expreſsly preſcribed them.

CHAP. VIII.

Of civil ſubjection, and civil liberty.

I. *General notion of ſubjection.* II. *Subjection private and public.* III. *Different degrees and ſorts of private ſubjection.* IV. *Different degrees and ſorts of public ſubjection.* V. *Civil ſubjection of the parts and of the whole.* VI. *What ſort of ſubjection implyed in the notion of a province.* VII. *Civil liberty what.* VIII. *Civil liberty of the parts and of the whole.* IX. *Slaves why incapable of being members of a civil ſociety.* X. *Where ſubjection ceaſes right of reſiſtance begins.* XI. *Relation of governour and ſubject is a limited one.* XII. *Reſiſtance to the ſupreme power how to be underſtood.* XIII. *Right of reſiſtance does not imply ſupreme civil power in the people.* XIV. *Opinion of Grotius explaned.* XV. *Civil judge not neceſſary to fix the point where right of reſiſtance begins.* XVI. *Treaſon and rebellion how guarded againſt notwithſtanding right of reſiſtance.*

General notion of ſubjection.

I. EVERY compact, in which a man conſents to lay himſelf under an obligation of doing or of avoiding what the law of nature had not otherwiſe obliged him to do or to avoid, is a diminution of his liberty. Before he had engaged in the compact, or had laid himſelf under the obligation; he was at liberty either to have done or to have avoided what is contained in the compact. But after he has conſented to be thus obliged; he is no longer poſſeſſed of the ſame liberty: he cannot be obliged to do or to avoid what is contained in the compact, and at the ſame time be at liberty either to do it or to avoid it, as he pleaſes.

But

But every compact, which implys a diminution of liberty, does not imply likewiſe a ſtate of ſubjection. The notion of ſubjection conſiſts in the obligation of one or more perſons to act at the diſcretion, or accord- to the judgment and will, of others. When therefore the matter of an obligation, which ariſes from compact, is ſo preciſely ſettled from the beginning, as to leave nothing to the judgment or will of thoſe, to whom we are obliged; the obligation, though it diminiſhes our liberty, does not place us in a ſtate of ſubjection. Such a compact gives them a claim upon us without giving them any authority over us. Their claim is ſo limited from firſt to laſt, by our own act and according to our own diſcretion and choice, as never to extend beyond ſuch limitation. This claim therefore is all along rather the effect of the power, which we have over ourſelves, than the effect of any power, which they have over us. But when the compact is ſuch from the beginning, as gives them a general demand upon us, and leaves the preciſe matter of the obligation to be in any reſpect determined by their diſcretion and choice; as far as it thus gives them a right to judge for us and to preſcribe to us, it gives them an authority over us, and places us in a ſtate of ſubjection to this authority.

II. Subjection is commonly divided into private and public. By private ſubjection is meant ſubjection to the authority of private perſons: and by public ſubjection is meant ſubjection to the authority of public perſons. Subjection private and public.

A civil ſociety, though it conſiſts of a great number of individuals, is conſidered as one artificial or collective perſon: becauſe it is guided by one common underſtanding, which is its legiſlative power, and acts with

one common force, which is its executive power. This artificial or collective body is called a public perſon. The ſubjection therefore, which is due to a civil ſociety, is public ſubjection. But the notion of a public perſon is not confined to the collective body of a civil ſociety. Whether the legiſlative body of ſuch a ſociety conſiſts of one natural perſon, as in monarchies, or is an artificial or collective perſon conſiſting of many natural ones, as in ariſtocracies, and in mixed conſtitutions; this natural or this collective perſon has the keeping of the common or public underſtanding: and in like manner the executive body, whether it is the ſame with the legiſlative body or different from it, acts with the common or public force. Theſe bodies therefore, that is, the conſtitutional governours of a civil ſociety, are called public perſons; and the ſubjection, which is due to them is public ſubjection.

[a] Grotius divides ſubjection, as it is here divided, into private and public. But firſt he diſtinguiſhes between aſſociation and ſubjection: and though he allows, that a right over perſons may be derived as well from aſſociation, as from ſubjection; yet this diſtinction implys, that, in his opinion, the right, which a ſociety or collective body of men acquires over the perſons of the ſeveral individuals, who have aſſociated or joyned themſelves into ſuch a collective body, is different from ſubjection. [b] He then goes on to divide aſſociations or ſocieties, as he afterwards divides ſubjection, into private and public. Thoſe he calls private aſſociations, which are formed by a ſmall number of private perſons, who have agreed to act together for the purpoſe of carrying on ſome private deſign. Public aſſo-

[a] L. I. C. V. § XXVI. VIII. [b] ibid. § XVII.

ciations

ciations are either ſuch as produce a public perſon, or ſuch as conſiſt of public perſons; that is, they are either formed by a large body of men, who have united themſelves by compact into a ſtate or civil ſociety; or elſe they are formed by a number of ſtates, which have agreed to act together in the proſecution of ſome common deſign. An aſſociation of the former ſort produces a public perſon; and an aſſociation of the latter ſort conſiſts of public perſons.

If the ſeveral perſons, who have formed themſelves into a ſociety, either private or public, have proceeded no farther than to unite themſelves by mutual conſent into one body, under the obligation of joyntly carrying on their common deſign; it muſt indeed be allowed, that the ſeveral members of ſuch ſociety will be equal to one another, when they are conſidered ſeparately: ſuch an agreement does not ſubject any one member to the authority of any other member; and much leſs does it ſubject all of them to the authority of any one or of a few. But in the mean time it is plane, that, as far as the matter of the obligation, which the ſeveral members lay themſelves under, is not preciſely limited from the beginning, all aſſociations produce ſubjection, not indeed a ſubjection of any one member to any other, but a ſubjection of any one to the collective body. For, as [c] we have elſewhere obſerved after our author, whatever meaſure is agreed upon in relation to the common purpoſe of the ſociety by a majority of the members, it will be binding upon all and each, not only upon thoſe, who make a part of the majority, but upon thoſe likewiſe, who diſapprove the meaſure ſo agreed upon; or even proteſt

[c] See B II. C. I. § II.

againſt it. Grotius, whilſt he diſtinguiſhes between the right over perſons, which ariſes from aſſociation, and the right over perſons, which ariſes from ſubjection, ſeems to allow, that ſuch a ſubjection, as we have been ſpeaking of, is produced by aſſociation: for he obſerves, [d] that the body of a civil ſociety, in particular, has a fuller right, than any other ſociety whatſoever, of binding its ſeveral members to act for the common benefit in ſuch a manner, as the common underſtanding dictates. And certainly, if each member of a ſociety, either private or public, has obliged himſelf by compact to be guided in purſuing the ends, for which ſuch ſociety is formed, by a judgment and will, which are not his own; this compact produces ſubjection; notwithſtanding our author diſtinguiſhes its effect from ſubjection, and calls it aſſociation. Any particular member of a ſociety may happen to concur with the majority; and if he does, he may appear, whilſt he acts according to the judgment and will of ſuch majority, to follow his own. But this concurrence, in regard to his obligation, is quite accidental: he would have been as much obliged to guide himſelf by the judgment and will of the majority, if he had diſſented from the meaſure, which they agree upon, as he is, when he happens to make a part of the majority, and to concur in what they eſtabliſh.

Different degrees and ſorts of private ſubjection.

III. [e] Private ſubjection admits of ſeveral different degrees, from a ſtate of abſolute or perſonal ſlavery to ſuch limited obligations, as can ſcarce be called ſubjection. A compact, by which we give any one perſon or any number of perſons a general demand upon us to act for their benefit, or for the benefit of any one

[d] L. II. C. V. § XXIII. [e] Ibid. § XXVI.

elſe,

elſe, without fixing any limits at all to the matter of the obligation, produces perfect ſubjection or ſlavery. This ſort of ſubjection, though it is ſometimes called abſolute ſubjection, is not abſolute in the ſtricteſt ſenſe of the word, ſo as to give the maſter a right to treat the ſlave in what manner he pleaſes, or to compel the ſlave to do any thing that he pleaſes: for we have already [f] ſeen, that the law of nature fixes ſome limitations to ſlavery, though the ſlave himſelf has not fixed any by the compact, which produced his ſubjection. It is called a ſtate of abſolute ſubjection; becauſe it is as abſolute, as the law of nature will allow it to be, or as the perſons, who place themſelves in ſuch a ſtate, can make it.

But all private ſubjection is not ſlavery. The compact, which produces it, may render it imperfect by limiting the matter of the obligation: and the ſubjection will be the leſs perfect, in proportion as leſs is left to the judgment and will of thoſe, to whom we are ſubject. A labourer, who has bound himſelf to do only one particular ſort of work, is in a ſtate of private ſubjection: his maſter by the compact, which is between them, has acquired a right to direct him in what relates to this work. But the ſubjection is imperfect: becauſe his obligation to be directed by the judgment and will of his maſter is limited, not only by the general law of nature, as in the caſe of ſlavery, but likewiſe by the particular compact, from which it aroſe.

Private ſubjection may be divided into different ſorts, as well as into different degrees. Where it has only the benefit of the ſuperiour in view; and all the benefit, which the

[f] See B. I. C. XX. § V.

inferiour finds in it, is merely accidental; it is ſervile ſubjection. But where ſuch conditions are annexed to it, as have the benefit of the inferiour principally in view either in whole or in part; that is, where the perſon, who is in ſubjection, is obliged either in whole or in part to act according to the judgment and will of another, for the ſame purpoſe, which he would naturally have purſued, if he had been free to judge and to chuſe for himſelf; this may be called liberal ſubjection. A child is in ſubjection to his parents, and a ward to his guardian: but this, though it is private ſubjection, is not of the ſervile ſort; becauſe the benefit of the child, or of the ward, is the end or purpoſe, which it has in view. In theſe two inſtances indeed the right to direct does not ariſe from the conſent of the perſon, who is in ſubjection: in the inſtance of a child and his parents, it ariſes out of the law of nature; and in the inſtance of a ward and his guardian, it ariſes either out of ſome act of a deceaſed parent, or out of the civil law, which places the child, during his minority, under the authority of his guardian. But where the civil law allows of adoption, and allows a child, before he is old enough to do any other valid act, to conſent to adoption; the ſubjection of the child to the parents, who adopt him, ariſes from his own conſent. In like manner, where the civil law allows an orphan to chuſe a guardian, before he is at a legal age to do any other valid act, the conſent of the orphan places him in a ſtate of ſubjection to his guardian. In both theſe caſes the ſubjection is of the private and of the liberal ſort. It is private; becauſe it is ſubjection to a private perſon: and it is liberal; becauſe it has the benefit of the inferiour in view. In private partnerſhips, each of the partners is in ſubjection

to

to the collective body, as far as the matter of the partnership extends: but this subjection, as it has the common benefit for its end, in which benefit each has an interest, is liberal subjection.

Grotius considers subjection as imperfect, not only where the obligation, on one side, and the demand, on the other side, are limited to some particular actions, and include a condition in favour of the person, who is in subjection; but likewise where the obligation and the demand, though they are under no limitation in respect of the matter of them, are limited in respect of the time, during which they are to continue. He would probably have been of another opinion, if he had attended here to a principle, from which he argues [t] elsewhere. When he is proving, that civil power may be sovereign, notwithstanding it is temporary; he observes, that the nature of a thing is not changed merely by its duration, and in particular that the nature of any moral power is to be judged of from the effects, which are produced by it, whilst it lasts, and not from the time, during which it lasts. Indeed the power of a master over his slave is not civil power; and the subjection of the slave is not civil subjection. But the principle, from which Grotius argues, is general: and if it is true, when applyed to power and subjection of one sort; it will be equally true, when applyed to power and subjection of any other sort. Now the effects of the masters power are the same, if the matter of the compact is the same; whether that power continues only for a determinate time, or for the whole life of the slave. If therefore the master has a power to direct all the actions of the slave without any limitation, ex-

[t] L. I. C. III. § XI.

cept

cept what ariſes from the general law of nature; the ſlave is as much in a ſtate of abſolute ſubjection, where this power continues only for a determinate time, for ſeven or for fourteen years, as where it continues during the life of the ſlave. The condition of a temporary ſlave, if we only conſider what it is, whilſt the ſlavery laſts, is neither better nor worſe, than the condition of a perpetual ſlave. Perhaps the proſpect, which the former has of recovering his liberty at a certain time, may make his preſent condition ſet eaſier upon him, than the preſent condition of the latter does, who has no ſuch proſpect before him. But the proſpect of coming into a better condition, however it may encourage him to bear his preſent condition well, makes no eſſential difference in the nature of the condition itſelf. Though he may be cheared by the hopes of recovering his liberty hereafter; yet he is now, whilſt his ſlavery laſts, as much in a ſtate of perfect ſubjection, as the other is. It muſt however be allowed, that, if we were to give our opinion, upon the different conditions of the temporary and the perpetual ſlave, we ſhould be apt to ſay, and ſhould have ſome reaſon for ſaying, that the former is in a better condition than the latter. But the reader, I ſuppoſe, is aware, that, when we make this judgment about the difference of their reſpective conditions, we conſider ſomething more, than merely their preſent conditions; we take the whole of their reſpective lives, their future as well as their preſent circumſtances, into the account, and reckon the condition of the one to be better than the condition of the other, not becauſe it is better juſt now, but becauſe it is better upon the whole.

IV.

IV. All public ſubjection is not civil ſubjection: for in public, as well as in private ſubjection there are different degrees and different ſorts: and civil ſubjection is one particular ſort and degree of public ſubjection. Different degrees and ſorts of public ſubjection.

Not only an individual or private perſon, but a nation likewiſe or ſtate, which is a public perſon, may have ſlaves. Thoſe, who are condemned to labour for the public in the mines, or in the gallies, or in any other work whatſoever, which the ſtate thinks proper to employ them about, are in public ſubjection. But as the benefit of the ſuperiour is the only end, which this ſubjection has in view, it is of the ſervile ſort; and as the matter of the obligation is not limited, it is abſolute in degree. The ſuppoſition, that they, who are thus in ſubjection to the public, are condemned to ſlavery, implys indeed, that their ſubjection does not ariſe from their own conſent; but that it is the puniſhment of ſome crime, which they have committed: the inſtance therefore may ſeem not to belong to ſuch ſubjection, as we are now ſpeaking of, which is ſubjection ariſing from conſent. However, as it is poſſible for a man thus to ſubject himſelf to an individual or private perſon by his own conſent, ſo it is poſſible for him in like manner to ſubject himſelf by a like conſent to a body politic or public perſon.

Labourers, who let themſelves out to the public to do ſome particular ſort of work, ſuch as mending roads, or making fortifications, or building ſhips, and likewiſe mercenary ſoldiers, are in a ſtate of public ſubjection. Their ſubjection is imperfect in degree; becauſe the matter of the obligation on their ſide, and of the claim on the ſide of the public, is limited: but in the mean time, as the end of it is rather the benefit of the public, than of themſelves, it is of the ſervile ſort.

ſort. But it may be worth the while to obſerve, that, even in theſe inſtances, the ſubjection is looked upon to be leſs ſervile, or approaches nearer to liberal ſubjection, in proportion as the perſons, who are in ſubjection, have a greater benefit from it. Thus the officers, the architects, and the maſter-builders are in ſubjection to the public, as well as the common ſoldiers, and the under-workmen: but the ſubjection of the former is more liberal, and of the latter more ſervile; only becauſe the obligation, in which their reſpective ſubjection conſiſts, has the benefit of the former more in view, and the benefit of the latter leſs in view.

Civil ſubjection is ſuch public ſubjection ariſing from conſent, as is limited in the matter of it to thoſe actions or things, which relate to the general welfare and ſecurity of the whole civil ſociety or of its ſeveral parts. The individuals, who have conſented to make themſelves members of a civil ſociety, are in conſequence of this conſent in a ſtate of ſubjection: becauſe they are obliged by it to act according to a judgment and will, which are not in their own keeping, but in the keeping of the public. This ſubjection however is neither abſolute nor ſervile. For ſince the matter of the obligation is limited to what relates to the general welfare and ſecurity of the whole ſociety or of its ſeveral parts; this limitation make the ſubjection imperfect. And ſince the members of the ſociety have a common intereſt in the good of the whole body, and a particular intereſt in the protection, which they have a right to, as they are parts of the whole; this end or view of the obligation makes the ſubjection liberal.

V. It is very difficult to affix a preciſe ſenſe to the words — civil ſubjection, and civil liberty. For whatever ſenſe we may endeavour to affix to them; any man, who chuſes to call it into queſtion, may produce numberleſs inſtances, both from what he has heard and from what he has read upon theſe points, to prove, that the words are not always uſed in this ſenſe: not becauſe there is no ſort of ſubjection, and no ſort of liberty, which may properly be called by theſe names; nor yet becauſe the definitions, which we may endeavour to give of theſe words, do not fully expreſs the nature of this ſort of ſubjection, or this ſort of liberty; but becauſe the words are frequently uſed as words of courſe, both in common converſation and in many political writings; ſo that numberleſs inſtances are to be found, in which ſome perſon or other has uſed the words, in ſpeaking or in writing, without any determinate meaning or perhaps without any meaning at all. Civil ſubjection of the parts and of the whole.

Indeed the moſt accurate writers do not always uſe theſe words in one and the ſame ſenſe. Thus, civil ſubjection means ſometimes the ſubjection of the whole ſociety, and ſometimes the ſubjection of its ſeveral parts; that is, both the ſubjection of the collective body to its conſtitutional governours, and the ſubjection likewiſe of the ſeveral members, either to ſuch conſtitutional governours or to the collective body, are uſually called civil ſubjection. And if we would avoid being miſled or perplexed, in what we read or hear upon theſe points; it will be neceſſary for us to diſtinguiſh theſe two ſenſes of the ſame words from one another, and to obſerve in which of them the words are uſed.

The ſeveral members of a civil ſociety are in a ſtate of civil ſubjection; whatever form of government is eſtabliſhed

eſtabliſhed in the ſociety. They are obliged by the ſocial compact to follow the dictates of the public underſtanding in what relates to the general good; whether the conſtitution is popular, or ariſtocratical, or monarchical, or mixed. The ſeat of the civil power indeed is different, in theſe different forms of government: ſo that the ſubjection of the individuals is more immediately due to a different ſort of public perſon. But wherever this power reſides, the ſubjection, which is due to it from the individuals, is only civil ſubjection. For this is all, that was due by the ſocial compact to the collective body: and this collective body, in ſettling the conſtitution by a fundamental law, cannot give either to a king, or to a ſenate of nobles, or to any other civil governours whatſoever, a more extenſive claim upon the ſeveral members, than ſuch body originally acquired by their particular conſent, either expreſs or tacit, when they united themſelves to it.

But though under all forms of government, the individuals, who have made themſelves members of a civil ſociety, are of right, whatever they may be in fact, in a like ſtate of civil ſubjection; yet in democracies the collective body itſelf is not under any ſubjection: it governs itſelf freely, and is not bound by the act of any one or more perſons. Whereas in other forms of government, if they have no mixture of a democracy in their conſtitution, there is a ſubjection of the whole, as well as of the parts, a ſubjection of the collective body, as well as of its ſeparate members. For the act of the conſtitutional governours is not only binding upon the ſeveral individuals, who compoſe the collective body, but in conſequence of the general conſent, by which the conſtitution was eſtabliſhed, it becomes binding upon this body itſelf.

From

From hence we may underſtand what ſort of freedom it is, which puts the difference between free ſtates and other ſtates. The individuals in a free ſtate are not free from civil ſubjection, any more than they are in any other ſtate, which is governed by a king, or by a ſelect body of nobles. But in a free ſtate the collective body of the whole ſociety is free, or is not under any ſubjection: whereas in abſolute monarchies, or in abſolute ariſtocracies, the collective body is in a ſtate of ſubjection to its conſtitutional governours; becauſe as far as the power of theſe governours extends, their act is binding upon the collective body, as well as upon the ſeveral members. Whether common uſage has given the title of free ſtates, or not, to thoſe nations, in which the form of government is a mixed one; ſuch nations have certainly the eſſence of a free ſtate; notwithſtanding a king may be a conſtituent part of the legiſlative body, and may be veſted with the executive power; provided the collective body is not bound by any act of legiſlation, in which it does not immediately and directly concur, either by itſelf or by its repreſentatives. The freedom of the collective body of a civil ſociety is not neceſſarily connected with a mixed conſtitution: it is the particular nature of the mixture, upon which that freedom depends. If the legiſlative body conſiſts of a ſingle perſon and of a ſelect number of hereditary nobility; though the conſtitution will be a mixed one, yet the collective body of the civil ſociety will be in ſubjection: becauſe in eſtabliſhing the conſtitution this collective body obliged itſelf, as far as the ends or purpoſes of ſocial union extend, to follow a judgment and will, which is not in its own keeping, but in the keeping of that particular part, which compoſes the legiſlative body. By adding to

theſe

theſe two parts of ſuch a mixed legiſlative a third, which conſiſts of repreſentatives choſen from time to time by the general body of the ſociety, this general body, which is uſually called the people, does not indeed reſerve to itſelf a full power of legiſlation; but it reſerves ſuch an independent power, as prevents its ſubjection: though it has not a power of making laws by its own judgment and will, yet without its own judgment and will, ſignifyed by its repreſentatives, no laws will be binding upon it.

A like independence, in ſuch a form of government as we have been deſcribing, is given to the ſingle perſon or king, whom we have ſuppoſed to be a conſtitutional part of the legiſlative body: for though, by the ſuppoſition of his being only a part of ſuch body, he has not in matters of legiſlation a power of binding either the general body of the ſociety, or the particular members of it, by his own judgment and will, without the concurrence of the other parts of the legiſlative; yet neither he himſelf, nor any one elſe within the ſociety, can be bound by any law, to which he does not conſent, at the time of making it; except the fundamental laws of the conſtitution, to which he conſented either expreſsly, when he accepted the crown, or tacitly by the act of accepting it. But when we ſay, that his conſent is neceſſary to make a law binding either upon himſelf or upon any one elſe within the ſociety; we muſt be underſtood to include the conſent of his predeceſſors, under the notion of his conſent. For as they acted by the ſame power, which he is poſſeſſed of, the effect of their conſent, in reſpect both of himſelf and of the ſubjects, is the ſame, as if ſuch conſent had been his own immediate act. If beſides this civil independence, which is

is given to one ſingle perſon within a ſociety by making him a conſtitutional and diſtinct part of the legiſlative body, we ſuppoſe the ſame perſon to be likewiſe inveſted with the ſupreme executive power; he may then very properly be conſidered as the ſupreme or ſovereign head of the ſtate. In this latter character only, as he is inveſted with the ſupreme executive power, all the members of the ſociety would be accountable to him, or to ſtanding judges, who act for him, in matters of public wrong; and they muſt have recourſe to him, or to the like judges, for redreſs in matters of private wrong. But if he was inveſted with no other power, beſides this; though he would be the ſupreme magiſtrate, he could not well be called the ſupreme head of the ſtate: he would be ſupreme in reference to other magiſtrates, who hold an inferiour executive power derived out of his; but as the executive power, even in its higheſt degree, is ſubordinate to the legiſlative power; ſo he, if he was inveſted with no other power beſides what is merely executive, would be ſubordinate to the legiſlative body. But by making him a conſtitutional and diſtinct part of the legiſlative, this ſubordination is ſo far taken off, and his executive power becomes ſo far independent or ſovereign, that though he cannot exerciſe this power in all inſtances according to his own judgment and will, yet as his conſent is neceſſary in making the laws, which direct the exerciſe of it, he is not obliged to exerciſe it according to the judgment and will of any other perſons without the concurrence of his own.

What ſort of ſubjection implyed in the notion of a province.

VI. Where the general body of a ſociety is in ſubjection; it is a material difference, whether its civil governours have a claim to this ſubjection, as they are the ruling parts of this particular body, or whether they have

have the like claim, as they are the ruling parts of ſome other ſociety. In the former caſe the ſociety, notwithſtanding its ſubjection, continues to be a ſtate; but in the latter caſe it is a province of that other ſociety or ſtate, the ruling parts of which have a claim to its ſubjection.

The ſuppoſition, that a province is in ſubjection to the ruling parts of a ſtate, implys, that the ſtate itſelf is in ſubjection. But we have here proceeded upon this ſuppoſition, only for the ſake of ſhewing, that, though the ſubjection is in all other reſpects of the ſame ſort, the difference of external and internal ſubjection will make one ſociety a province and another a ſtate. For it is by no means eſſential to the notion of a province, that the ſtate, of which it is a province, ſhould be in ſubjection to any particular ruling parts. A ſociety may be a province to a free ſtate, as well as to a ſtate, which is not free. Though a free ſtate is not in ſubjection to any particular ruling parts; yet if the general or collective body of ſome other ſociety is in ſubjection to the general or collective body of ſuch free ſtate, this other ſociety will be a province.

Civil liberty what.

VII. By natural liberty is ſometimes meant the independent phyſical power, which individuals have of judging, chuſing, and acting for themſelves. But when natural liberty is diſtinguiſhed from civil liberty; the former means the moral liberty of mankind in a ſtate of nature, and the latter means their moral liberty in a ſtate of civil ſociety. Now the moral liberty of mankind in a ſtate of nature conſiſts in a power o facting in what manner they think fit; as far as they are under no reſtraints from the law of nature, when they are conſidered as ſeparate and independent individuals. And their civil liberty, is ſometimes defined to be the

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like power of acting in what manner they think fit; as far as they are under no reſtraints from civil laws. This definition of civil liberty is ſo contrived as to make it anſwer very well in the words of it to the definition of natural liberty. But it is certainly liable to many objections, and does not fix the true point of difference between the two ſorts of liberty.

All laws, which are made by a civil legiſlator, are civil laws. Now in perfectly monarchical conſtitutions the monarch is the civil legiſlator. His laws therefore, whatever may happen to be the matter of them, whether they tend to the general benefit of the ſociety, or to his own particular intereſt, may be called civil laws. From hence it will follow, if civil liberty is as much liberty as is conſiſtent with civil laws, that the ſubjects under all the oppreſſion, which the laws of a deſpotic monarch can bring upon them, will be in poſſeſſion of their civil liberties, not only in right but in fact. I am aware however, that this objection may be obviated by looking back into the nature of the ſocial compact: for as this compact limits civil power or the power of a civil governour, ſo it limits likewiſe the matter of the laws, which he has authority to make, to ſuch things, as are neceſſary or conducive to the ſecurity and welfare of the whole ſociety or of its ſeveral parts. No command therefore of the monarch, though he is the civil legiſlator, can properly be conſidered as a civil law, if it is inconſiſtent with the ends of ſocial union and civil government. So that, notwithſtanding civil liberty ſhould be defined to be as much liberty as is conſiſtent with civil laws, the ſubjects, who are oppreſſed by the ſocial commands of an abſolute monarch, could not be in poſſeſſion of their civil liberty: becauſe they are

under the reſtraint of ſuch commands, as are not civil laws. Without examining this anſwer, we will ſuppoſe it ſufficient ſo far to obviate the objection, as to ſhew, that the definition, when it is rightly explaned and duly qualifyed, is a true one. But ſtill this anſwer will not ſo far remove the objection, as to ſhew, that the definition is a good one: for no definition can be a good one, which wants to be explaned and qualifyed, before it will convey a preciſe notion of the term defined.

But we may object farther, that, if civil liberty conſiſts in as much liberty, as is conſiſtent with civil laws, or in the power of mankind to act in what manner they pleaſe, where civil law does not reſtrain them, there can be no ſuch thing as civil liberty in any ſociety whatſoever. For the liberty of individuals is [h] reſtrained in many inſtances, particularly in ſuch rights as ariſe out of an injury, by the mere act of civil union without the aid of any civil law, and antecedently to the poſitive or expreſs inſtitution of any. In all ſocieties therefore, whatever the form of government or the tenor of the civil laws may happen to be, the members are under ſome reſtraints, which do not come from civil laws.

Perhaps by conſidering a conſequence, which will follow from this definition, we may be led to the true point of difference between natural and civil liberty. If civil liberty is as much liberty, as is conſiſtent with the reſtraints of civil laws; the conſequence will be, that every new law, however beneficial it may be either to the whole body politic or to the ſeveral members, will be a diminution of civil liberty: becauſe it produces a farther reſtraint, which the ſubjects were not under be-

[h] See B. II. C. V.

fore the law was made. But as the private and ſervile ſubjection of a ſlave does not conſiſt in his being reſtrained by the commands, which his maſter has actually given him; ſo neither is there any reaſon to ſuppoſe, that the public and liberal ſubjection of a member of civil ſociety conſiſts in the reſtraints, under which he is actually laid by the civil laws. A ſlave is in ſubjection, becauſe he is liable to be reſtrained, not only by ſuch commands, as he has actually received from his maſter, but by ſuch likewiſe, as he may receive from him hereafter. And in like manner a member of any civil ſociety is in ſubjection, becauſe he is liable to be reſtrained, not only by ſuch laws, as the civil legiſlator has eſtabliſhed already, but by ſuch likewiſe, as he may eſtabliſh, when ſome future occaſion makes it neceſſary. The ſubjection of a ſlave is different indeed, both in ſort and in degree, from the ſubjection of a member of civil ſociety. They differ in ſort; becauſe one of them is private and ſervile, and the other is public and liberal: and they differ in degree; becauſe one extends to all a mans actions, and the other is limited to thoſe actions only, which relate to the general ſecurity and welfare of the whole body politic or of its ſeveral parts. But however theſe two inſtances of ſubjection may differ in other reſpects, in this they agree, that both of them are ſubjection: the member of a civil ſociety, as well as the ſlave, is under an obligation of acting according to a judgment and will, which are not in his own keeping. As far as this obligation extends, that is, as far as their reſpective ſubjection extends, neither of them is poſſeſſed of his natural liberty. The natural liberty of the ſlave is deſtroyed by his being obliged to follow the judgment

and will of his maſter in all things: and the natural liberty of the member of a civil ſociety is abridged by his being obliged to follow the judgment and will of the public in ſuch things, as relate to the common or general good. Thus we ſee at laſt, that this obligation of a member of civil ſociety, which is nothing elſe but the obligation of the ſocial compact, is what puts the difference between natural and civil liberty. If therefore we define natural liberty to be as much liberty as is conſiſtent with the obligation of the law of nature, we ſhould define civil liberty to be as much liberty as is conſiſtent with the obligation of the ſocial compact.

Civil liberty of the parts and of the whole.

VIII. In order to underſtand the ſeveral ſenſes, in which civil liberty is ſpoken of, we muſt diſtinguiſh it, as we before diſtinguiſhed civil ſubjection, into the civil liberty of the parts, and the civil liberty of the whole; that is, into the liberty of the ſeveral individuals, who have united together and compoſe the collective body of the ſociety, and the liberty of this collective body itſelf. The civil liberty of the ſeveral members of a ſociety implys a freedom from all, except civil, ſubjection: but the civil liberty of the whole body implys a freedom from all ſubjection whatſoever. After a number of individuals have united together and formed a civil ſociety; though any one of them is equal to any other, when they are conſidered ſeparately; yet each by the ſocial compact is made ſubject to the joynt authority of the whole or collective body. But in the mean time this whole or collective body is under no reſtraint, either from within or from without, except the reſtraints of the law of nature: the ſocial compact does not give any particular part of ſuch body a right or authority to direct or to bind the whole: and much leſs does it

it give ſuch right or authority to any other ſociety of the ſame ſort, or to the ruling part of any other.

When the ſociety has proceeded farther, than the mere act of ſocial union, and has eſtabliſhed ſome other form of government, which is different from ſuch a perfect democracy, as would reſult from this act alone; it will depend upon the nature of that form of government, which is ſo eſtabliſhed, whether the civil liberty of the whole ſhall remain or not. An abſolute monarchy puts an end to this kind of civil liberty. For where a ſingle perſon in the collective body has a conſtitutional right of directing the whole, this collective body is in a ſtate of ſubjection: becauſe it is bound to act for the purpoſes of ſocial union by a judgment and will, which are not in its own keeping. This indeed is, of right, only civil ſubjection. But though civil ſubjection is conſiſtent with the civil liberty of the parts or ſeveral members; it is not conſiſtent with the civil liberty of the whole or collective body. For civil liberty is as much liberty as is conſiſtent with the obligation of the ſocial compact: and this compact, whilſt it placed the ſeparate members of the ſociety under civil ſubjection, left the joynt or collective body free to judge and to chuſe for itſelf. An abſolute ariſtocracy is likewiſe inconſiſtent with the civil liberty of the whole: becauſe, though ſuch a conſtitution puts the power of governing the ſociety into the hands of more perſons than one, yet it places the whole body in a ſtate of ſubjection to a ſmall number of men, who are only a particular part of that whole. A mixture of theſe two forms of government, in whatſoever manner the mixture is made, will be as inconſiſtent with the civil liberty of the whole, as either of them alone would have been: for under ſuch a mixed go-

vernment the collective body of the ſociety will be in a ſtate of ſubjection; that is, it will be under an obligation of acting according to a judgment and will, which are not in its own keeping, but in the keeping of a part. But in popular forms of government, and in ſuch mixed forms likewiſe, as are in part popular, the civil liberty of the whole remains: becauſe the collective body is not bound to follow the dictates of any judgment or will, in which it does not concur either by itſelf or by its repreſentatives.

In any of the other forms of government, as well as in the popular forms, the civil liberty of the parts or ſeveral members of the ſociety remains of right. The ſubjection, which they owe to their conſtitutional governours, whether the government is in the hands of a king, or of a ſenate of hereditary nobility, is only civil ſubjection. No conſtitutional civil governours, whatever their titles or denominations may be, have any other right or moral power of reſtraining the ſeveral members, than the collective body of the whole ſociety has in a perfect democracy: and this right is no other, than what is derived from ſocial union, a right to direct them what they are to do and what they are to avoid for the general good, and to enforce theſe directions, where it is neceſſary, by the uſe of the joynt ſtrength.

You may therefore aſk perhaps, of what importance it is to individuals what form of government they live under; if an abſolute monarchy, or an abſolute ariſtocracy, whilſt they take away the civil liberty of the whole collective body, leave the ſeveral members the ſame right to their civil liberty, that they would have had under a popular conſtitution? The anſwer to this queſtion is obvious. There is a wide difference between the right of the individuals to their civil liberty

berty, and their enjoyment of this liberty in fact. Under every form of government their civil liberty is the ſame in right; but there is not the ſame ſecurity under every form, that it will be ſo in fact. Though the members of a civil ſociety are not ſlaves in right to an abſolute monarch, who has all civil power in his hands, both legiſlative and executive; yet he is in ſuch a ſituation, as gives him an opportunity, and arms him with ſtrength enough, to treat them in fact, as if they were his ſlaves. It is poſſible, that a ſovereign prince, who has as abſolute authority, as the nature of civil power will admit of, may make the general good of his people the meaſure of his conduct. But it is poſſible likewiſe, that he may hold the oppoſite conduct, and inſtead of regarding their intereſt, may compel them, as if they were his ſlaves, to advance a ſeparate intereſt of his own; whether he places this ſeparate intereſt in gratifying his ambition, or his avarice, or his vanity, or his love of pleaſure. The ſeveral members of the ſociety, when they are in ſuch a ſituation, do not enjoy their civil liberty: but the nature of the conſtitution does not take it from them of right; the injuſtice of him, who adminiſters the conſtitution, takes it from them in fact. Since therefore in the nature of the thing there is a poſſibility, and ſince from the general temper of mankind, there is ſome likelihood, that where all is left to the will of one man, the truſt, which is repoſed in him, will be abuſed; it is neceſſary, in order to ſecure the civil liberty of the ſeveral members in fact, to preſerve and maintain the civil liberty of the collective body, by giving it ſo much weight and influence in the legiſlative, that nothing can be done there without its conſent, or without the conſent of its repreſentatives.

We

We may now underſtand what is meant, when, upon a change of the civil conſtitution of government in any nation from popular or mixed, to ariſtocratical or monarchical, we ſay, that the nation has loſt or has given up its civil liberty. What is thus more immediately loſt or given up of right is the civil liberty of the collective body, and not the civil liberty of the individuals. This body, whilſt the form of government was popular, acted for itſelf, according to its own judgment and will: but upon ſuch a change in the conſtitution, it is brought into civil ſubjection, and obliges itſelf, in purſuing the ends of a civil ſociety, to act according to a judgment and will, which are in the keeping of the governing part; of one ſingle perſon, if the new form of government is monarchical, or of a body conſiſting of a few hereditary nobility, if it is ariſtocratical. But whatever the collective body of the ſociety gives up in this change of the conſtitution, the ſeveral members of it, when they are conſidered ſeparately, have the ſame right to their civil liberty, that they had before. Whilſt the popular form of government continued, each was obliged to purſue the ends of ſocial union according to a judgment and will, which were not in his own keeping; and each is obliged to no more than this under the new form: the only difference in right is, that in the popular form this judgment and will were in the keeping of the collective body or of its agents and repreſentatives; whereas in the monarchical or ariſtocratical form, they are in the keeping of the particular ruling part of that body. But though this, in reſpect of the ſeparate members, is the only difference in right, there will moſt probably be another difference in fact: the civil liberty of the whole of the collective

collective body is the ſupport and ſecurity of the civil liberty of the ſeveral parts or members. The loſs therefore of the former in right will commonly be attended with the loſs of the other in fact.

Perhaps it may here be aſked, how the ſeveral parts or members of a ſociety, when they are conſidered ſeparately, can poſſibly have a right to their civil liberty, where ſuch a form of government has been eſtabliſhed by conſent, as is inconſiſtent with the civil liberty of the whole or collective body? becauſe this collective body conſiſts of all the members taken together; and it is not eaſy to conceive, that the ſeveral parts ſhould retain a right to civil liberty, when the whole has loſt it. This would indeed be impoſſible, if the ſame thing was meant by civil liberty, when we ſpeak of the whole or collective body, and when we ſpeak of the ſeveral parts or members of that body. But the civil liberty of the whole conſiſts in a freedom from all ſubjection whatſoever: whereas the civil liberty of the parts conſiſts in a freedom from all, except civil, ſubjection. The collective body therefore, when it is placed in a ſtate even of civil ſubjection, is ſaid to have loſt its civil liberty. Now this is all the ſubjection which ſuch body owes in right to its civil governours. The ſubjection therefore of the whole, that is, the loſs of the civil liberty of the whole, implys nothing more than the civil ſubjection of the ſeveral parts. But as long as the parts or, ſeveral members, are only in a ſtate of civil ſubjection, they have a right to their civil liberty; that is, they have a right to be free from all reſtraints, except thoſe, which, being neceſſary or conducive to the general good, ariſe out of the ſocial compact, or are derived from it.

In

In mixed forms of government, where the agents or repreſentatives of the people make a diſtinct and conſtitutional part of the legiſlative body; it is commonly ſaid, that the civil liberty of the people conſiſts in their right of thus acting in the legiſlative by their repreſentatives. But before we can judge either of the truth or of the propriety of what is thus ſaid; it will be neceſſary to conſider, what is here meant by the people: for the word — people — may either mean the collective body conſiſting of all the members taken together, or it may mean the ſeveral members taken individually.

Now the preciſe notion of civil liberty, when we ſpeak of the whole people conſidered as one collective body, conſiſts in the freedom of this body from all ſubjection whatſoever, or in its right of not being obliged by any judgment and will, with which its own judgment and will do not concur. But this freedom of the collective body from all ſubjection implys, that it has a right of acting as a diſtinct and conſtitutional part of the legiſlative, or that nothing can be done by the legiſlative without its concurrence. For ſince the act of the legiſlative is binding upon the whole ſociety; if the legiſlative could do any act without the concurrence of the general body of the people, this body would be in a ſtate of ſubjection. From hence it appears, that, when we ſpeak of the people as one general or collective body, we may very properly ſay, that the civil liberty of the people conſiſts in the right of acting as a diſtinct part of the legiſlative: becauſe the collective body, if it had not this right would be in a ſtate of civil ſubjection; and a ſtate even of civil ſubjection inconſiſtent with the civil liberty of ſuch body.

But though the civil liberty of the collective body of the people neceſſarily implys a right of acting in the le-

giſlative, yet the particular manner of acting there by repreſentatives is not eſſential to the general notion of civil liberty. The people, conſidered as one collective body, will not be obliged to follow any judgment and will, with which its own does not concur, whether it acts there by its individual parts, or by its repreſentatives; that is, whether the concurrence of the ſeveral members taken individually, or of the majority of them, is neceſſary in making laws; or whether the concurrence of repreſentatives, who are choſen and appointed from time to time by the collective body for this purpoſe, is ſufficient. The conſtitution or eſtabliſhed form of government in each nation, where the body of the people is poſſeſſed of its civil liberty, determines in which of theſe ways this body ſhall act in the legiſlative; whether it ſhall act by its ſeveral members, ſo that all the individuals ſhall have a right of voting in the legiſlative, or whether it ſhall act by its repreſentatives, ſo that the right of voting there ſhall be confined to theſe repreſentatives. If therefore by the conſtitution of any particular nation the collective body of the people has only a right of acting in the legiſlative by its repreſentatives; the conſtitutional liberty of the people may in that nation be ſaid to conſiſt in this right. For as the civil liberty of the collective body of the people in any nation implys, according to the general notion of it, a right of acting in the legiſlative in ſome manner or other; ſo in that particular nation the conſtitution has ſettled the manner, and has determined this right of the collective body to be a right of acting there by its repreſentatives. Thus we find, that the civil liberty of the people, when conſidered as one collective body, may properly enough be ſaid to conſiſt in their right of acting in the legiſlative; becauſe ſuch a right is neceſſarily

ceſſarily implyed in the freedom of this collective body from ſubjection: and we find likewiſe, that their conſtitutional civil liberty, when they are thus conſidered as one collective body, may be properly ſaid to conſiſt in their right of acting in the legiſlative by repreſentatives in thoſe nations, where the conſtitution requires them to act in this particular manner, and does not allow them to act individually.

But if by the people we mean the ſeveral individuals; we cannot with any propriety ſay, that their civil liberty conſiſts in their right of acting individually in the legiſlative, and much leſs that it conſiſts in their right of acting there by their repreſentatives. In a perfect democracy, if ſuch a form of government was eſtabliſhed in any civil ſociety, each member of the ſociety would have a right of acting individually in the legiſlative: no laws indeed would be eſtabliſhed, or nothing would be done, upon the ſingle authority of any one member: but the opinion or vote of any one would have as much weight and influence, as the opinion and vote of any other. The civil equality of the ſeveral members conſiſts in the right, which any one of them has of thus acting in the legiſlative with as much weight and influence, as any other of them. But we cannot ſuppoſe the civil liberty of each to conſiſt in the ſame right, without ſuppoſing ſome of the members in every civil ſociety, even where a democracy is eſtabliſhed, to have no civil liberty; unleſs the democracy is a perfect one. In all other democracies, only ſome of the members have a right of acting individually in the legiſlative, and many others of them are excluded from acting there at all. Either therefore in imperfect democracies, where the members of the ſociety, who act in the legiſlative,

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act individually, thoſe, who are excluded from acting there, upon account of ſome defect in their age, their ſex, or their fortune, have no civil liberty; or elſe in perfect democracies the civil liberty of the ſeveral individuals does not conſiſt in their civil equality, that is, in the right, which each of them has, of acting individually with an equal weight and influence in the legiſlative. The common miſtake is, that we ſuppoſe the civil liberty of the individuals, like the civil liberty of the collective body to mean a freedom from all ſubjection whatſoever. And ſince in a perfect democracy, where each member acts individually with an equal weight and influence in the legiſlative, no one member and no ſelect number of members has any authority over the reſt; we are apt to conſider each as exempted from all ſubjection, and to place the eſſence of the civil liberty of individuals in ſuch a civil equality. This principle, as we have ſeen already will lead us to conclude, that many members of every civil ſociety, even under a democratical form of government, can have no civil liberty; becauſe even in democracies, unleſs they are perfect ones, many of the members are ſo far from acting with as much weight and influence in the legiſlative, as the reſt, that they are excluded from acting there at all. But the civil liberty of the ſeveral members of a ſociety does not conſiſt, as the civil liberty of the collective body does, in a freedom from all ſubjection whatſoever; it conſiſts only in a freedom from all, except civil, ſubjection. Unleſs therefore the members of a civil ſociety by ceaſing to have a right of acting individually in the legiſlative are in a ſtate of any other, beſides civil, ſubjection; they

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have not loſt their civil liberty, by ceaſing to have this right: and conſequently the eſſence of their civil liberty cannot conſiſt in this right.

We may ſhew in like manner, that, in thoſe democracies, or in thoſe mixed conſtitutions, where the collective body of the people acts in the legiſlative by repreſentatives, though the civil liberty of ſuch collective body may be ſaid to conſiſt in this right, yet the civil liberty of the individuals cannot be ſaid to conſiſt in it. There is in fact no democracy and no mixed conſtitution any where eſtabliſhed, which allows every individual a right of voting in the choice of ſuch repreſentatives. Many are excluded from this right, not only upon account of their ſex, or of their legal minority, but upon account likewiſe of the ſmallneſs of their property, or even upon account of the ſort of property, which they are poſſeſſed of, though it ſhould in itſelf be ever ſo large. Shall we ſay therefore, that thoſe, who are thus excluded from voting in the choice of repreſentatives, have no civil liberty, and that thoſe only have civil liberty, who have a right of voting? This I ſuppoſe, will ſcarce be ſaid: and if it is not ſaid, the conſequence is obvious. If thoſe individuals, who have no right of voting in the choice of the repreſentatives of the people, either in a democracy or in a mixed form of government, have their civil liberty; the conſequence is, that their civil liberty cannot conſiſt in a right of acting by repreſentatives in the legiſlative: for the agents or repreſentatives of the people cannot naturally be conſidered as the agents or repreſentatives of thoſe individuals, who have no right of voting in the choice of them.

It is indeed very intelligible, that, when the laws of a ſociety have limited the right of voting, in the choice of the agents or repreſentatives of the people, to thoſe perſons, who have ſuch qualifications, as theſe laws deſcribe, the agents or repreſentatives ſo choſen will have the ſame power of binding the ſeveral individuals, even thoſe amongſt the reſt, who had no vote in the choice of them, that the collective body, or the majority of ſuch collective body, in a perfect democracy, has of binding its ſeveral members, even thoſe amongſt the reſt, who do not concur with ſuch majority. But in the mean time, they are not properly the repreſentatives of any individuals in particular, but of the collective body in general: and eſpecially they are not the agents or repreſentatives of thoſe individuals, who had no vote in the choice or appointment of them.

But though the civil liberty of individuals in any nation, where the collective body of the people acts in the legiſlative by repreſentatives, does not conſiſt in their right of thus acting; yet the right of the collective body thus to act is of great importance to the civil liberty of the individuals: the eſſence of the civil liberty of individuals does not conſiſt in this right; but this right is the ſupport of their civil liberty. For the freedom of the collective body of the people, from all ſubjection whatſoever, is what maintains and ſupports the ſeveral individuals in their freedom from all, except civil, ſubjection.

IX. It is eſſential to a civil ſociety, that the ſeveral members of it ſhould be perſons of [i] free condition; that no perſon, who is not of free condition, is capable

Slaves why incapable of being members of a civil ſociety.

[i] See B. I. C. I. § XI.

have not loſt their civil liberty, by ceaſing to have this right: and conſequently the eſſence of their civil liberty cannot conſiſt in this right.

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IX. It is eſſential to a civil ſociety, that the ſeveral members of it ſhould be perſons of [1] free condition; that no perſon, who is not of free condition, is capable

Slaves why incapable of being members of a civil ſociety.

[1] See B. I. C. I. § XI.

ble of being a member of ſuch a ſociety. But the freedom here required is not a freedom from all ſubjection, but only from abſolute and ſervile ſubjection, that is, from ſlavery. A freedom from all ſubjection whatſoever is ſo far from being neceſſary to qualify any perſon to be a member of a civil ſociety; that the civil ſubjection which each member is under, either to the ſociety in general, or to the ruling parts of it in particular, is the very reaſon, why a ſlave is incapable of being a member. A ſlave is obliged to act for his maſters benefit in all things, according to the judgment and will of his maſter. He is therefore incapable of becoming a member of a civil ſociety: becauſe, whilſt he is under this unlimited obligation to a private perſon, he is incapable, or has not the liberty, of obliging himſelf, as every member of a civil ſociety is obliged, to act for the general ſecurity and welfare of ſuch ſociety, according to the judgment and will of the public. If we were to ſuppoſe the ſeveral members of a civil ſociety to be under no ſubjection to the civil government of it, that is, to be under no obligation of maintaining the general ſecurity, and of advancing the general intereſt of it, under the conduct of the public underſtanding; a ſlave would be as capable, as any one elſe, of being a member of ſuch a ſociety.

Since ſlaves are not, and cannot be, members of a civil ſociety; their ſituation is ſomething ſingular, when they live within its territories, and their maſter is a member of it. As they have no will of their own, they cannot, by any expreſs or tacit act, ſubject themſelves to the laws of the ſociety, either perpetually, as thoſe perſons do, who become members of it, or for a time, as aliens do, who reſide within its terri-

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tories. And ſince they cannot ſubject themſelves to the laws, for the benefit and ſecurity of others; they are therefore incapable of acquiring a right to the protection of the laws for their own benefit and ſecurity. But by means of their maſter they are brought under the authority of the laws. They are conſidered as parts of their maſter; and are therefore ſubject to the laws, becauſe he is ſubject them. Or to ſpeak more planely, the ſociety would not ſuffer him to bring any perſon, and much leſs to bring any conſiderable number of perſons, to live within its territories, unleſs he would agree to make them accountable to the laws, or to be accountable for them himſelf, at leaſt as far as the general ſecurity requires: and his agreement for this purpoſe binds them; becauſe their will is concluded by his. Upon his account likewiſe, or by his means, they are placed under the protection of the ſociety: for as he has a juſt right to be protected by the ſociety; ſo he has a right, that his ſlaves, who are parts of him, ſhould likewiſe be protected by it; that is, as far as he has an intereſt in their labour, they may be conſidered as his property, and will therefore be under the protection of the ſociety, in the ſame manner with any other parts of his property.

The principal queſtion concerning the protection of ſlaves is, whether the ſociety has authority to protect them againſt their maſter? [k] We have ſeen, that the power of the maſter is under ſome limitations, which neceſſarily ariſe out of the law of nature: and conſequently by any ſuch treatment of them, as exceeds theſe limitations, he does them an injury. The queſtion then is, whether the ſociety, of which he is a member,

[k] See B. I. C. XX. § V.

has authority to protect them againſt ſuch injuries, or to puniſh him for having been guilty of them? The mere act of ſocial union does not ſeem to give the ſociety ſuch an authority over the maſter for the benefit or ſecurity of his ſlaves. The ſociety, in conſequence of the maſters act, by which he became a member of it, takes the ſlaves under its protection as a part of his property: but the authority thus acquired is an authority to protect them for his benefit, and does not include an authority to protect them againſt him for their benefit. Civil laws however may do what the mere act of civil union had not done: if it appears to the common underſtanding, that the maſters liberty of treating his ſlaves otherwiſe, than the law of nature allows, will tend to make him a worſe member of ſociety, more imperious towards his inferiours, more aſſuming towards his equals, more inſolent towards his ſuperiours, and more cruel towards all; the civil legiſlator has a right to reſtrain him from theſe exceſſes, and to puniſh him, if he is guilty of them.

Right of reſiſtance begins where civil ſubjection ceaſes.

X. It is a queſtion of ſome importance, and has been thought a queſtion not eaſily to be determined; whether the members of a civil ſociety have, upon any event or in any circumſtances whatſoever, a right to reſiſt the governours, or rather the perſons, who are inveſted with the civil power of that ſociety.

Without ſtopping here to enquire, whether ſome, if not moſt of the difficulties, that we meet with in this queſtion, have not ariſen from the common manner of ſtating it; we will firſt conſider the queſtion itſelf, as it is here propoſed, and then endeavour to clear up ſome of the principal difficulties relating to it, as well thoſe, which have ariſen from the manner of ſtating it, as thoſe, which have ariſen from ſome other cauſe.

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The ſubjection, which is due from the members of a civil ſociety, that is, from the people, to thoſe perſons, who are inveſted with the civil power of that ſociety or are appointed to govern it, may ceaſe ſeveral ways. Firſt, their ſubjection ceaſes, when the governours of the ſociety abdicate or relinquiſh their power. Thoſe perſons, who were the governours of the ſociety, ceaſe to be the governours of it by abdication: whatever power or authority they might have before, they ceaſe to have the ſame power or authority, after they have relinquiſhed it. And if there is no power or authority on one ſide; no ſubjection is due on the other ſide.

Secondly; civil power or authority in its higheſt degree is limited by the laws of nature and of God: it does not give thoſe, who are inveſted with it, a right of commanding what is inconſiſtent with theſe laws, or of compelling obedience to ſuch commands. In reſpect therefore of what is inconſiſtent with theſe laws, civil ſubjection ceaſes. For where the civil governours have no right to command or to compel, the people are under no obligation to obey or to ſubmit. A diſtinction indeed is ſometimes made here between an active and a paſſive obedience, between an actual compliance of the people with any commands of the civil governours, which are contrary to the laws of nature and of God, and a paſſive ſubmiſſion to what theſe governours think fit to inflict upon them for not complying. But this diſtinction cannot be ſo applyed, as to ſhew, that where the people are not obliged actively to obey the command, they are obliged paſſively to ſubmit to the evil, which is brought upon them for not obeying it. You may ſay, that the law of nature and of God, though it does not leave the people at liberty to do

what it has forbidden, leaves them at liberty to ſuffer patiently what the civil governour thinks proper to make them ſuffer. But if this is all, that you have to urge in ſupport of the duty of paſſive obedience, where there is no obligation to an active one; this duty reſts upon a very weak foundation. Though the people are at liberty to ſubmit patiently, if they will; it will be no conſequence, that they are obliged thus to ſubmit: though no law of nature or of God has forbidden paſſive obedience; unleſs perhaps the law of ſelf-preſervation, upon which however I ſhall not inſiſt; yet you cannot conclude from hence, that ſuch obedience is a duty: to ſupport this concluſion you muſt produce ſome law of nature or of God, which enjoyns it. In the mean time it ſeems to be ſelf-evident, that, where the civil governours of a ſociety have no right or authority to command, they have no right or authority to make uſe of force either to compel obedience or to puniſh diſobedience. But it is a known principle of natural law, that, where there is no right on one part, there is no obligation on the other part. The people therefore are not in ſubjection to any force, which is made uſe of by the civil governours for theſe purpoſes, or are not obliged paſſively to ſubmit to ſuch force.

Thirdly, according to the firſt and moſt ſimple notion of a civil ſociety, the civil power is originally veſted in the collective body of ſuch ſociety. Whenever therefore any civil governours are appointed; the degree and extent of their power will depend upon the conſtitutional laws: their authority can neither be more[1] nor leſs, than theſe laws, or rather than the people,

[1] See B II. C. VI. § II.

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by compact in conſequence of theſe laws, have entruſted them with. From hence it appears, that their power, if it is limited by the conſtitution, does not extend beyond theſe limitations: and where their power fails, the ſubjection of the people ceaſes.

Fourthly; though the governours of a ſociety ſhould be inveſted by the conſtitution with all civil power in the higheſt degree and to the greateſt extent, that the nature of civil power will admit of; yet this does not imply, that the people are in a ſtate of perfect ſubjection. Civil power is in its own nature a limited power: as it aroſe at firſt from ſocial union, ſo it is limited by the ends and purpoſes of ſuch union: whether it is exerciſed, as it is in democracies, by the body of the people, or, as it is in monarchies, by one ſingle perſon. But if the power of a monarch, when he is conſidered as a civil governour, is thus limited by the ends of ſocial union; whatever obedience and ſubmiſſion the people may owe him, whilſt he keeps within theſe limits; he has no power at all, and conſequently the people owe him no ſubjection, where he goes beyond them.

Having thus taken a ſhort view of the ſeveral ways, in which the authority of the civil governours of a ſociety fails, and the ſubjection of the people ceaſes, we may now return to the queſtion, which was before us. If you aſk, whether the members of a civil ſociety have a right to reſiſt the civil governours of it by force? your queſtion is too general to admit of a determinate anſwer. In ſome circumſtances the people can have no ſuch right; in other circumſtances they may have ſuch a right. As far as the juſt authority of the civil governours and the due ſubjection of the people extend; reſiſtance by force is rebellion. Subjection conſiſts in an

obligation to obey: as far therefore as the people are in ſubjection; they can have no right to reſiſt: becauſe an obligation to obey and a right to reſiſt are inconſiſtent with one another. But the power of civil governours is neither neceſſarily connected with their perſons, nor infinite, whilſt it is in their poſſeſſion. It ceaſes by abdication; it is over-ruled by the laws of nature and of God; and it does not extend beyond the limits, which either the civil conſtitution or the ends of ſocial union have ſet to it. The power therefore of the civil governours of any ſociety fails of right, that is, they have no juſt authority; where they have abdicated what power they had; where they command what is contrary to the laws of nature and of God; where they uſurp any branch of civil power, which the conſtitution of their country never gave them; or where they exerciſe a power, which is inconſiſtent with the ends of ſocial union, and conſequently which no civil conſtitution whatſoever could give them. Where their power thus fails in right, and they have no juſt authority, the ſubjection of the people ceaſes; that is, as far as of right they have no power, or no juſt authority, the people are not obliged to obey them; ſo that any force, which they make uſe of either to compel obedience or to puniſh diſobedience, is unjuſt force: the people may perhaps be at liberty to ſubmit to it, if they pleaſe; but becauſe it is unjuſt force, the law of nature does not oblige them to ſubmit to it. But this law, if it does not oblige the people to ſubmit to ſuch force, allows them to have recourſe to the neceſſary means of relieving themſelves from it and of ſecuring themſelves againſt it, to the means of reſiſtance by oppoſing force to force, if they cannot be relieved from it and ſecured againſt it by any other means.

XI.

XI. In ſtating the queſtion concerning reſiſtance, I have choſen to call one of the parties the governours, or rather the perſons, who are inveſted with the civil power of a ſociety, and to call the other party the people or the members of that ſociety; that I might avoid ſpeaking of them in this queſtion under the relation of governours and ſubjects. For though the two parties do ſtand in this relation to one another; yet the relation itſelf is a limited one; it is limited in the ſame manner with the civil power of the former and with the ſubjection of the latter. As far as one of theſe parties has juſt authority and the other of them owes ſubjection; ſo far they are governours and ſubjects: but where the authority of the former, and the ſubjection of the latter ceaſe; that is, where the former have no right to command or to compel, and the latter are under no obligation to obey or to ſubmit; there this relation ceaſes, and they are not to be conſidered as governours and ſubjects.

Relation of governour and ſubject is a limited one.

I have indeed, for want of a better word, ſpoken of the former under the name of governours: and this word, in the common acceptation of it, has a relative meaning. But I have at the ſame time endeavoured to ſhew the reader, that I would have him underſtand it here rather in an abſolute, than in a relative ſenſe, by informing him, that, when I ſpeak of governours, I mean thoſe perſons in a civil ſociety, who are inveſted with the civil power of it.

The queſtion, as we uſually find it ſtated, is; whether ſubjects have a right to reſiſt their civil and conſtitutional governours? When the two parties concerned in the queſtion are thus ſpoken of under ſuch names, as import the relation, which they bear to one another,

and

and in conſequence of which one has a right to command and the other is obliged to obey; we are firſt led by the terms of the queſtion to imagine, that it regards them in this relation, that is, that it regards them in ſuch caſes as this relation extends to, and then to anſwer it in the negative: for where one of the parties has a right to command and the other is obliged to obey; the latter can have no right to reſiſt: becauſe an obligation to obey is inconſiſtent with a right to reſiſt. But ſince this queſtion regards the two parties, when this relation ceaſes between them; that is, ſince it regards them in thoſe caſes only, to which the authority of the one and the ſubjection of the other does not extend; if we ſtate it in ſuch a manner, as not to mix this relation with the terms of it, the true anſwer will be more planely ſeen and more readily admitted.

But if any one chuſes to ſtate the queſtion in the uſual manner, and apprehends, that there may be ſome fallacy in ſtating it otherwiſe, there is no occaſion to diſpute this point with him. For let him ſtate it as he will; the power, or authority, which the conſtitutional and civil governours of a ſociety have over their ſubjects, ceaſes by abdication; and even whilſt they are poſſeſſed of this power or authority, as they are only human, conſtitutional, and civil governours, it is limited by the natural and revealed laws of God, by the laws of the national conſtitution, and by the ends of civil union. He may therefore give them the name of governours, and he may likewiſe give the people the name of ſubjects, even beyond theſe limitations, if he thinks proper: but ſtill the former can only be called governours and the latter can only be called ſubjects in words; for beyond theſe limitations the relation of governours and ſubjects ceaſes in right.

XII.

XII. St. Paul uſes the word —power, to ſignify a ruler or a perſon inveſted with power, where he ſays,[m] "that rulers are not a terror to good works, but to evil; wilt thou then not be afraid of the power? do that which is good and thou ſhalt have praiſe of the ſame." He certainly here means the ſame thing by power and by ruler; ſince they who do good can no otherwiſe have praiſe of the power, than by having it of the ruler, who is inveſted with the power. The word is uſed in the ſame ſenſe, when we ask, whether it is lawful to reſiſt the ſupreme power? we intend, or ſhould intend, to aſk, whether the people or members of a civil ſociety have a right to make uſe of any forcible reſiſtance, in oppoſition to ſuch rulers or governours of the ſociety, as are inveſted with ſupreme power?

Reſiſtance to the ſupreme power how to be underſtood.

They therefore who deny, that the people have ſuch a right of reſiſtance, gain very little advantage to their ſide of the queſtion by changing the words of it from civil power to ſupreme power. For the power of civil governours even in the higheſt degree of it is only human power, and is only civil power. They may call it ſupreme power with a deſign of ſetting it clear of any conſtitutional limitations: but if it has no other limitations, it will at leaſt be limited by the laws of nature and of God, and by the ends and purpoſes of civil union.

XIII. In this ſtate of the queſtion, — Whether the people have any right to reſiſt the ſupreme power? —it is uſually urged in contradiction to ſuch a right; that the people, if their power is inferiour to the power of the civil governours, muſt be obliged to ſubmiſſion,

Right of reſiſtance does not imply ſupreme civil power in the people.

[m] Rom. XIII. 3.

and conſequently can have no right of reſiſtance. But it is abſurd to ſay, that the power of the people is equal or ſuperiour to the power of the civil governours, when thoſe governours are ſuppoſed to be inveſted with ſupreme power: becauſe in ſaying this, we ſuppoſe a power in the people, which is equal or ſuperiour to the ſupreme.

Two ways have been thought of for avoiding this ſuppoſed abſurdity. One of theſe ways is, by maintaining, that all civil conſtitutions whatſoever are ultimately perfect democracies, or that every where, without exception, the ſupreme civil power is veſted in the people and not in the conſtitutional civil governours. The other way is, by maintaining, that in all civil conſtitutions whatſoever there is a mutual ſubjection of the civil governours and of the people; that the former have the ſupreme civil power, when they govern well; but that the latter have it, when they govern ill.

But I cannot make uſe of either of theſe opinions, after what I have [n] ſaid about them: if I have ſhewn the falſhood of them, I cannot make uſe of them conſiſtently with truth: and though I may have failed of doing this, yet I cannot make uſe of them conſiſtently with myſelf. I muſt therefore endeavour to clear up this ſuppoſed abſurdity by ſome other means.

The right or liberty of reſiſtance, which belongs to the people, is not properly a civil power, but a natural right: it is not an authority, which civil union gives them; it is only what remains of natural liberty exempted from the obligations of civil union. The conſtitutional civil governours are, by the ſuppoſition, inveſted with the ſupreme power. But this power, ſince it is only

[n] See B. II. C. IV. § XII.

civil

civil power, is limited in its own nature: it is limited by the ends and purpoſes of civil union. Beyond theſe limits therefore the natural rights or natural liberties of the people ſtill ſubſiſt, the civil governours have no power, and the people owe them no ſubjection. This right of the people may perhaps at firſt ſight appear to be a civil power; becauſe it ſeems to ariſe out of the ſocial compact, or at leaſt to depend upon this compact. But it no otherwiſe depends upon the ſocial compact, than as this compact does not extend to it. The ſocial compact limits the civil power of the conſtitutional governours to the purpoſes of civil union: and this limitation is the foundation of the peoples right to reſiſt tyrannical power: not becauſe it gives them any power, which nature had not given them; but becauſe it leaves them in poſſeſſion of their natural liberty. They had naturally a right of reſiſting injuries by force. As far as the ends of civil union require this natural right to be given up or reſtrained, ſo far it is given up or reſtrained, either mediately or immediately, by civil union. But as far as theſe ends do not require this right to be given up, ſo far it ſtill ſubſiſts in a ſtate of civil ſociety.

You will now perhaps ſee, that when you aſk, whether the peoples right of forcibly reſiſting the tyranny of civil governours is ſuperiour, or inferiour, or equal, to the ſupreme power, with which we have ſuppoſed thoſe governours to be inveſted, the queſtion is an improper one. The right of the people and the power of the governours differ from one another in ſort, and therefore cannot be compared as to degree: neither of them can with any propriety be ſaid to be ſuperiour, or inferiour, or equal, to the other. The ſupreme

preme power of the governours is a civil power: the right, which the people have, to reſiſt tyrannical oppreſſion is a natural right. The ſupreme power of the governours aroſe from civil union, and was veſted in them by the law or compact, which formed the conſtitution: the right, which the people have to reſiſt tyrannical oppreſſion, aroſe from nature, and ſubſiſts after civil union by means of the limits, which the ends of ſuch union have fixed to all civil power.

If we were to maintain, that the peoples right of reſiſtance is civil power, and were to ſuppoſe at the ſame time, that the conſtitutional governours have ſupreme civil power; we might eaſily be reduced either to the abſurdity of ſuppoſing, that there is a civil power in the people, which is ſuperiour to the ſupreme, or elſe to the neceſſity of allowing, what we before denyed, that in all conſtitutions of government the ſupreme civil power is veſted in the people. But by looking into the origin of the peoples right to reſiſt unſocial and tyrannical oppreſſion, we find it to be a natural right and not a civil power. All mankind in a ſtate of equality had a natural right to reſiſt injuries: and the right, which they have in a ſtate of ſociety to reſiſt unſocial and tyrannical oppreſſion, is only ſo much of that natural right, as is not brought under civil ſubjection by the ſocial compact. What we maintain therefore is, that the people have ſuch a right of reſiſtance, as we have been ſpeaking of; not becauſe they have a civil power, which is either equal or ſuperiour to the ſupreme civil power of their conſtitutional governours; but becauſe this ſupreme civil power on the one part, and conſequently the civil ſubjection of the people on the other part, is limited by the

the ends and purpoſes of ſocial union; ſo that beyond this limitation the natural right of reſiſting injuries ſtill remains, even after mankind are united into civil ſocieties, and have inveſted their conſtitutional governours with ſupreme civil power.

XIV. The general queſtion, ſays [a] Grotius, concerning reſiſtance is, Whether the members of a civil ſociety have a right to reſiſt either the ſupreme civil governours of it, or inferiour magiſtrates, who act by the authority and under the commiſſion of ſuch governours? It is acknowledged indeed by all, who have any ſenſe of duty, that, if the ſupreme governours enjoyn any thing, which is contrary to the law of nature or to the commands of God, we ought not to obey them. But if they do us any injury; either becauſe we thus refuſe to obey them; or becauſe upon any other account it is their will and pleaſure; is this injury rather to be ſubmitted to, than reſiſted by force? I have rendered this latter ſentence interrogatively; though from the preſent manner of pointing it in all the editions of our authors work, that I have ſeen, we may collect, that it is commonly ſuppoſed to contain rather a full declaration of his opinion, than a queſtion, what the true opinion is. But whoever will be at the trouble of conſidering the conſtruction of the ſentence itſelf, and of comparing it with what goes before and with what follows it, will find reaſon to think, that our author only deſigned here to ſtate the queſtion, and not to determine it.

Opinion of Grotius explaned.

But be this as it will; when he comes to declare his own opinion, he planely favours the doctrine of non-reſiſtance, though not without ſome reſtrictions. At

[a] L. I. C. IV. § I.

the

the ſame time he cautions his readers to obſerve, that many acts of the people, which go under the name of reſiſtance againſt their civil governours, do not come within his notion of unlawful reſiſtance. It may be proper for us to conſider in the firſt place what particular inſtances of reſiſtance he allows of, and upon what principles he allows of them: becauſe ſome of theſe principles, when they are fully explaned, will help us to correct his opinion upon the general queſtion.

Firſt, [b] if an abſolute monarch, or any other civil governours, who have been inveſted with ſupreme power, abdicate or otherwiſe planely relinquiſh this power; Grotius allows, that the people have then a right of reſiſting them by force: becauſe whatever power they may have been inveſted with, an abdication or dereliction of it brings them back into the condition of private perſons.

He extends the right of reſiſtance, upon this principle, farther than the caſe of a voluntary dereliction. For though he had obſerved, that where the ſupreme civil governours are chargeable with ſome inſtances of negligent adminiſtration, theſe neglects cannot reaſonably be conſtrued as an evidence of their intention to relinquiſh their ſupreme power; yet where they become open and declared enemies of the ſociety, ſuch hoſtile conduct is, in his opinion, an evidence, that they have no intention to govern it, and conſequently is a dereliction or forfeiture of that power. For the protection of the ſociety, or the ſecurity and advancement of its general good, is included in the notion of civil government. An intention therefore to govern and an intention to deſtroy are inconſiſtent with one another

[b] ibid. § IX.

another. Grotius has left his readers to conjecture what acts of hoſtile conduct he would allow to be an evidence, that the ſupreme governours of a civil ſociety are become enemies to it. He ſeems to have had in his mind ſuch a high degree of oppreſſion, as conſiſts in nothing leſs, than an endeavour to extirpate the ſociety: for he declares in general, that no king, who governs only one ſociety, can be ſuppoſed capable of ſuch hoſtile conduct, as he means, unleſs he is out of his ſenſes; and that even, where a king governs two ſocieties, his attachment to one of them, can no otherwiſe lead him to ſuch conduct, than with a view of making room in the territories of the other to bring colonies thither from his favorite ſociety. But whatever high degrees of tyranny Grotius might here have in his mind; if the principle, from whence he argues, will prove, that civil governours forfeit their ſupreme power by endeavouring to extirpate the ſociety; the ſame principle will likewiſe prove, that they forfeit this power by exerciſing ſuch lower degrees of oppreſſion, as neceſſarily deſtroy the welfare of it; though perhaps they may not deſtroy the exiſtence of it. The welfare of a ſociety, as well as the preſervation of its being, is included in the purpoſe of civil government; no perſon therefore can at the ſame time have a will to govern the people, and a will to hold ſuch a conduct, as is planely inconſiſtent with their ſocial welfare.

Grotius, as we ſhall ſee preſently, maintains, in the general queſtion concerning the right of reſiſtance, that the people have no right to reſiſt civil governours, who are in actual poſſeſſion of ſupreme power. But in the mean time, as he was diſpoſed to provide in ſome

[c] Ibid. § XI.

meaſure, if not for the welfare, yet at leaſt for the exiſtence of civil ſociety, he maintains, that civil governours, with whatever power the conſtitution may have originally inveſted them, forfeit that power, when they become enemies to the public. Upon this principle the right of the people to reſiſt a tyrant, who has been inveſted with ſupreme power, does not imply a right to reſiſt a civil governour, who is in actual poſſeſſion of ſupreme power: becauſe ſuch a right of reſiſtance, as this, does not begin; till the civil governour, by a forfeiture of his ſupreme power, is reduced to the condition of a private perſon.

But we may obſerve by the way, that the ſuppoſition of a forfeiture of ſupreme power is not neceſſary to prevent this power and the right of reſiſtance from interfering with one another. When civil governours degenerate into tyrants; whether they forfeit their ſupreme power, or continue in poſſeſſion of it; to reſiſt them in the exerciſe of a tyrannical power, and to reſiſt the ſupreme civil power, is not the ſame thing. Supremacy of civil power does not imply, that they, who are poſſeſſed of it, have a right to do whatever they pleaſe. The notion of ſupremacy implys indeed, that their power is under no conſtitutional reſtraints from without. But ſtill it is only civil power, and is therefore under a natural limitation from within: it is limited in its own nature to the ends and purpoſes of civil union. The people therefore by reſiſting a civil governour, who is poſſeſſed of ſupreme power, in ſuch acts as are contrary to the ends and purpoſes of civil union, do not reſiſt the ſupreme power: for ſuch acts, ſince they exceed the natural limitations of all civil power, even in the higheſt degree of it, are not acts of the ſupreme power.

When

When we ſpeak of ſupreme civil power in the abſtract; we may eaſily prove, that the members of a civil ſociety have no right to reſiſt it. The notion of ſupreme civil power implys a right to direct and to compel; and as far as there is ſuch a right on one ſide, there can be no right to diſobey or to reſiſt on the other ſide. From hence it will follow, that civil governours, who are in poſſeſſion of this power, cannot lawfully be reſiſted in the exerciſe of it. But it will be no conſequence, that they cannot lawfully be reſiſted, when they exceed the natural limitations of ſupreme civil power by exerciſing ſuch an unſocial power, as is not included in the notion of it, and as they were never inveſted with. The double ſenſe of the words — ſupreme power — has probably been the occaſion of ſome miſtakes in this queſtion. Sometimes they ſignify this power in the abſtract: and ſometimes they ſignify a civil governour, who is inveſted with this power, that is, a ſupreme potentate. St. Paul, as we have obſerved, uſes the words in this latter ſenſe, when he commands chriſtians to be ſubject to the higher or ſupreme powers. Now ſince it is unlawful to reſiſt the ſupreme power in one ſenſe, we are apt to conclude, that it muſt likewiſe be unlawful to reſiſt the ſupreme power in the other ſenſe. But if, inſtead of ſpeaking of civil governours under the abſtract name of ſupreme powers, we would call them ſupreme potentates; we ſhould find, that this concluſion is a mere fallacy, and has nothing to ſupport it, beſides the ambiguous ſenſe of the words — ſupreme power. — However unlawful it may be to reſiſt the ſupreme power, when this power is conſidered in the abſtract, it will not follow from hence, that it muſt be equally unlawful to reſiſt ſupreme potentates. The notion of

ſupreme power, when we conſider it in the abſtract, includes its natural and due limitations: it is nothing elſe but the higheſt degree of civil power, that is, of a power to direct and to compel the ſeveral members of a civil ſociety to act in ſuch a manner, as the common benefit and general ſecurity requires: and ſince the ſeveral members have by their civil union agreed to form ſuch a power, the ſame conſent, by which they formed it, obliges them to pay obedience and ſubmiſſion to it. When this power is by the conſtitution lodged in the hands of certain perſons; theſe perſons become the ſupreme potentates of the ſociety, and are uſually called by the abſtract name of ſupreme powers. As far as theſe ſupreme powers, or ſupreme potentates, exerciſe only the civil power, it is unlawful to reſiſt them: for as the people are obliged to pay obedience and ſubmiſſion to the power, with which they are inveſted, it cannot be lawful to reſiſt them in the exerciſe of this power. But ſupreme potentates have a natural ſtrength in their hands, which may poſſibly be abuſed: though the ſupreme power is limited in its own nature to the purpoſes of civil union; it is poſſible, that they may be diſpoſed to exerciſe this natural ſtrength to contrary purpoſes. To reſiſt them in this undue exerciſe of the natural ſtrength, which is in their hands, can no otherwiſe be called reſiſtance to the ſupreme power, than as theſe ſupreme potentates are themſelves called by this abſtract name. In the mean time it is ſuch a reſiſtance, as cannot be ſhewn to be unlawful. However the people may be obliged to obey them and to ſubmit to them, when they exerciſe the ſupreme civil power; it does not follow, that there is the like obligation, when they exerciſe any other power: and

where

where there is no obligation to obey and to ſubmit; the law of nature allows of reſiſtance.

From hence we may underſtand, what it is, that puts the difference between rebellion and ſuch reſiſtance as is lawful. It is rebellion to reſiſt the ſupreme governours, whilſt they keep within the natural limitations of ſupreme power, and only command or enforce what is neceſſary or conducive to the general welfare and ſecurity. Whereas the reſiſtance, which is lawful, is a reſiſtance to theſe governours, when they abuſe the natural ſtrength, which the ſupreme power has put into their hands, to the unſocial purpoſes of tyranny and oppreſſion.

From hence likewiſe we may underſtand what anſwer is to be made, when we are aſked, whether it is lawful to reſiſt the ſupreme power, if the commonwealth cannot otherwiſe be preſerved? If by ſupreme power is here meant ſupreme power in the abſtract, the caſe, which the queſtion ſuppoſes, is impoſſible. For ſupreme power, in this ſenſe of the words, is a power, which operates only for the general benefit: and it is a contradiction to ſuppoſe, that the preſervation of the commonwealth ſhould ever require us to reſiſt ſuch a power, as this. Or if ſupreme power means the ſupreme potentates, or ſupreme governours of a ſociety; before we can anſwer the queſtion here propoſed, it will be neceſſary to enquire, whether it relates to them, when they excerciſe only the civil power, with which they are entruſted, or when they exerciſe an exorbitant power, which does not belong to them. In the former of theſe ſenſes, inſtead of anſwering the queſtion in the negative, we might obſerve, as we did before, that it ſuppoſes a caſe, which is impoſſible or implies a con-

tradiction. Civil power in the higheſt degree, that the nature of it will admit, is limited to the purpoſe of advancing or ſecuring the general welfare: and ſuch a power, whether we conſider it as it is in its own nature, or as exerciſed by any particular perſons, in whom the conſtitution has veſted it, cannot be inconſiſtent with the preſervation of the commonwealth. But in the latter ſenſe we may anſwer this queſtion in the negative: for though the ſupreme potentates or, as they are ſometimes called, the ſupreme powers of a civil ſociety cannot lawfully be reſiſted, where they exerciſe only the ſocial power, which was produced by civil union, and is veſted in them by the conſtitution; yet where they exerciſe an exorbitant power, which is inconſiſtent with the preſervation of the ſociety, they may lawfully be reſiſted. The ſupreme civil power, of which they are poſſeſſed, gives them no right to exerciſe this exorbitant power: and where they have no right to act, there is no law of nature, which obliges the body of the ſociety to ſubmit to them.

But to return to our author. Barclay, [d] he ſays, is of opinion, that a king, notwithſtanding he has been inveſted with ſupreme power, forfeits his power by alienating it; where the laws have either ſettled the ſucceſſion to the crown, or have made the crown elective. Grotius is doubtful upon this head; and rather inclines to the contrary opinion. Where the tenure of the crown is of the uſufructuary ſort, he thinks, that the king by alienating it does nothing, and conſequently that the alienation can produce no effect. The concluſion, which he leaves his readers to deduce from hence is, that ſuch an alienation, ſince it produces no

[d] Ibid. § X.

effect,

effect, cannot produce a forfeiture. In ſupport of this opinion he alledges the roman law concerning uſufruct. But without enquiring what any poſitive law may determine in other caſes of uſufruct; let us enquire what the law of nature or reaſon will lead us to determine in the caſe of an uſufructuary kingdom. In reſpect of the perſon, to whom the king, that is in poſſeſſion, intends to transfer the ſupreme power, his act will produce no effect: the act is void in itſelf, and cannot make a valid transfer. But the queſtion is, Whether this act will produce no effect in reſpect of himſelf and of the people; whether, though it is void, as a tranſfer, it may not be valid, as a forfeiture? Some writers conſider ſuch an alienation as two diſtinct acts: it imports, they ſay, an intention in the king to give up the kingdom for himſelf, as well as an intention to transfer it to another. And though they allow, that the latter of theſe acts is void, or produces no effect, becauſe he has no power to transfer what he holds by uſufruct; yet they contend, that the former act is valid, becauſe he has a power of relinquiſhing what he ſo holds. This however is a groundleſs diſtinction: his act imports only an intention to give up his kingdom for the particular purpoſe of transferring it to a certain perſon; it does not import an intention of parting with it either abſolutely or for any other purpoſe. We may ſay with more reaſon, that he holds his kingdom by a compact between himſelf and the people, under a law, which, by the ſuppoſition, has either fixed the ſucceſſion to the crown or made it elective. This alienation therefore, as it is inconſiſtent with this law, is a breach of the compact on his part; and this releaſes the people from it on their part.

But be this as it will; Grotius, even whilſt he doubts, whether ſuch an act of an uſufructuary king amounts to a forfeiture, and is rather inclined to think the contrary, maintains, that if the king attempts to make the transfer good in fact by delivering up the kingdom, the people have a right to reſiſt this attempt by force. Supremacy of civil power, and a ſupreme claim or a claim of full property to this power, are different things. If any conſtitution, which has inveſted a king with ſupreme power, has at the ſame time made the crown elective, or ſettled the ſucceſſion ſo, as to make it unalterable without the conſent of the people; he holds the ſupreme power, whilſt he is in poſſeſſion of it, only by an uſufructuary tenure, and conſequently has no right to alienate it. Nor can he give himſelf ſuch a right by virtue of his ſupreme power: for the tenure, by which the ſupreme power is held, is not ſubject to the juriſdiction of this power: the law, which eſtabliſhed it, came originally from the body of the ſociety, and was made binding upon him by means of a compact, to which he conſented either expreſsly, when he accepted the crown, or tacitly by accepting it under ſuch a reſtriction, as this law laid it under. But if he is thus bound by a compact with the people not to alter the tenure of the crown and make it patrimonial, when the conſtitution has made it uſufructuary; the people have a right to oppoſe ſuch an alteration, and to make uſe of force in oppoſing it, when they cannot prevent it by any other means.

As Grotius allows in the firſt place, that the people have a right to reſiſt ſuch civil governours, as have been inveſted with ſupreme power, when they have abdicated or forfeited this power; ſo he allows ſecondly,

ly, that they have the like right, either where the conſtitution has laid the civil governours under any ſpecial limitations, beſides what ariſe from the nature of civil power, or where it has reſerved any ſpecial liberty to the people, beſides what is included in the notion of civil ſubjection.

The example, which we have been conſidering, ſeems, as Grotius explanes it, to be of this latter ſort: for whilſt he is inclined to think, that an uſufructuary king does not forfeit his crown by attempting to alienate it; he maintains, that the ſpecial tenure of the ſupreme power, which the conſtitution has ſettled in ſuch a kingdom, will give the people a right to reſiſt ſuch an attempt of the king.

In one of the caſes, where [e] he allows a right of reſiſtance in the people, we cannot properly ſay, that there is a conſtitutional limitation upon the ſupreme power of the civil governours: becauſe the caſe ſuppoſes the ſupreme power to be veſted in the people, and the civil governours, who have the lead occaſionally in public affairs, to be made accountable to the people, by the conſtitution. The ſpartan conſtitution was of this ſort. It was a nominal kingdom, but a real democracy. The kings were indeed empowered to act for the ſtate, but were made accountable to the people, or to officers, who ſtood in the place of the people. Grotius obſerves, that wherever ſuch a conſtitution has been ſettled from the firſt, or is ſettled afterwards by mutual agreement between the king and the people, there is a right in the people not only to reſiſt the king by force, but even to puniſh him, when he offends againſt the laws of the ſociety, or acts inconſiſtently

[e] Ibid. § VIII.

with

with the welfare of it. But what our author here calls reſiſtance is rather an exerciſe of conſtitutional power: the caſe ſuppoſes the ſupreme power to be veſted in the people, and the power of the king to be made ſubordinate to theirs by the conſtitution.

In mixed forms of government, where the king has ſome parts of the ſupreme power and the people have ſome other parts of it, [f] Grotius allows the people to have a right of reſiſting the king by force, if he invades thoſe parts of the civil power, which belong to them: becauſe as far as the power extends, which is reſerved to them by the conſtitution, the king has no authority and the people are not in ſubjection. This right of the people to make war in defence of their conſtitutional power may perhaps be queſtioned, if the civil power of making war is veſted in the king. But Grotius replys, that the civil power of making war, which is here ſuppoſed to be veſted in the king, relates only to foreign wars, and means nothing elſe but the ordinary right of directing the common force of the ſociety againſt its enemies from without: it does not relate to ſuch an extraordinary uſe of force, as may be neceſſary for maintaining the conſtitutional rights of the people againſt any attempts to invade them from within. The conſtitution therefore may have precluded the people from making war upon their own authority againſt the foreign enemies of the ſociety: but as the ſame conſtitution has, by the ſuppoſition, reſerved to the people a right to ſome parts of the ſupreme power, it muſt be underſtood to leave them at liberty to defend themſelves by force in the poſſeſſion of this right, if they cannot ſecure it by any other means. To ſuppoſe that the

[f] Ibid. § XIII.

people

people have a right, and yet that they are not at liberty to defend this right by ſuch means, as are neceſſary, is a contradiction; it is to ſuppoſe, that they have a right, and that they have no right at the ſame time.

Grotius does not here conſider the ſupremacy of the people as the foundation of their right of reſiſtance: he argues in favour of ſuch a right from this general principle, that as far as the power of the people extends, their civil governours have no authority over them, and they are not in ſubjection. In the next example he argues ſtill more planely from the ſame principle; whilſt he maintains, that the people may have a right of reſiſtance, though they have no part of the ſupreme power.[g] He ſuppoſes a ſociety to have eſtabliſhed a deſpotic conſtitution by giving the whole civil power both legiſlative and executive to the king, but at the ſame time to have expreſsly reſerved a right of reſiſtance to the people upon ſome certain events. Reſerves of this ſort are, he ſays, a juſt foundation of reſiſtance, when theſe events happen: becauſe, though they do not imply, that the people have retained any part of the ſupreme power, yet they imply, that the people have retained ſome part of their natural liberty, and, as far as theſe reſerves extend, have exempted themſelves from ſubjection.

We may obſerve, that the principle, upon which our author proceeds, in theſe two examples, to ſupport the particular right of reſiſting unconſtitutional uſurpations of power, is the ſame, that [h]we made uſe of above to ſupport a general right of reſiſting all unſocial and tyrannical oppreſſion. Where the conſtitution has limited the power of civil governours by a

[g] Ibid. § XIV. [h] See ſect. XIII.

diviſion

diviſion of the ſupreme power between them and the people; or where it has in part exempted the natural liberty of the people from ſubjection by any poſitive reſerves; Grotius conſiders theſe conſtitutional limitations or reſerves, as the foundation of a right of reſiſtance; becauſe the civil governours have no authority and the people are not in ſubjection, beyond ſuch limitations or reſerves. Now civil power on the one hand, though it is under no poſitive or conſtitutional limitations, is limited in its own nature by the ends and purpoſes of civil union: and the notion of civil ſubjection on the other hand implys, that they, who owe no other ſubjection, retain as much of their natural liberty, as is conſiſtent with the ſame ends and purpoſes; whether the conſtitution, under which they live, has made any poſitive reſerves of it or not. So that beyond theſe natural limitations and reſerves the civil governours have no authority, and the people are not under ſubjection, in any conſtitution or in any form of civil government whatſoever. Thus the ſame principle, which led our author to conclude, that the people may lawfully reſiſt the civil governours of a ſociety, where theſe governours exceed any conſtitutional limitations, which have been ſet to their power, or where the people have expreſsly made any conſtitutional reſerves of a part of their liberty, may lead his readers to conclude farther, that the people have a general right of reſiſtance; where the civil governours, even though they are inveſted with ſupreme power, exceed the natural limitations of all civil power; or where they break in upon that part of the natural liberty of the people, which is reſerved to them of right, by the very notion of civil ſubjection, under every poſſible form of civil government.

But Grotius, whilſt he furniſhes his readers with this principle, does not follow it himſelf ſo far as it would have led him. For in examining the general queſtion, Whether the members of a civil ſociety have any right of reſiſting ſuch civil governours, as are inveſted with ſupreme power? he favours the negative part of it, and endeavours to ſupport his opinion by arguing partly from the nature and ends of civil ſociety, and partly from what he ſuppoſes to have been the doctrine of St. Paul and St. Peter. He allows however, that the members of a civil ſociety have ſuch a right in caſes of extreme neceſſity; except where they ſuffer for the religion of Chriſt, and there he thinks, that it is their duty to ſubmit patiently, if they cannot ſave themſelves by flight.

What he urges [i] from the nature and ends of civil ſociety is of no great importance, and he does not ſeem to lay much ſtreſs upon it. "A civil ſociety, he ſays, as it is inſtituted for the purpoſe of ſecuring the common tranquility, has a general power of reſtraining and controling its ſeveral members, as far as ſuch a power is neceſſary for obtaining this purpoſe: and in particular it has a power, in view to the public peace and order, to reſtrain and over-rule that promiſcuous right of reſiſting injuries, which individuals were poſſeſſed of in a ſtate of nature. As a civil ſociety has this power, ſo we may be ſure, that it was the intention of mankind, when they formed themſelves into ſuch bodies, to make uſe of it: becauſe if this promiſcuous right of reſiſting injuries is not reſtrained and over-ruled, civil ſociety could not obtain its proper purpoſe of ſecuring the public tranquility. There might indeed be an aſſembly

[i] Ibid. §II.

of

of men, though each of them continued to have this right; but it could only be a confuſed and unconnected aſſembly; it could not be a civil ſociety." But the concluſion, which Grotius here endeavours to eſtabliſh, will not determine the queſtion, which is now before us. Though we grant, that the promiſcuous right of reſiſting injuries, which mankind were poſſeſſed of in a ſtate of nature, is reſtrained and over-ruled in a ſtate of ſociety; yet it will not follow from hence, that their whole right of reſiſting injuries is thus reſtrained and over-ruled: they ceaſe to have a promiſcuous right of reſiſting injuries; but it is no conſequence, that they have no right of reſiſtance at all. Our author in order to ſupport his own opinion ſhould have proved, not merely, that the members of a civil ſociety have not the ſame promiſcuous right of reſiſting injuries, which they had in a ſtate of nature, but that civil union deſtroys the whole right of reſiſting injuries, or at leaſt the right of reſiſting ſuch unſocial injuries, as are done to them by their civil governours: becauſe, though they have not a promiſcuous right of reſiſting all injuries whatſoever, they may poſſibly have a right of reſiſting the unſocial and tyrannical oppreſſion of their civil governours. It muſt be allowed, that civil ſocieties were inſtituted for the purpoſe of ſecuring the common tranquility. But this tranquility does not conſiſt in ſetting ſtill and doing nothing, or in patiently ſubmiting to injuries, without endeavouring to repel them for the preſent or to guard againſt them for the future. If this was the notion of that tranquility, which the inſtitution of civil ſociety has in view, we might eaſily prove, that all reſiſtance of injuries whatſoever is contrary to the nature of civil ſociety. But the common tranquility, which

civil

civil union was intended to obtain, conſiſts in the quiet and peaceable enjoyment of our rights, that is, it conſiſts in a ſecurity againſt ſuffering injuries: and from this purpoſe of civil union we can only infer, that it reſtrains the promiſcuous right of reſiſtance, as far as is neceſſary to prevent mankind from doing injuries to one another, and not that it deſtroys their whole right of reſiſtance by obliging them to ſubmit to injuries without ſeeking for redreſs. Where the members of a ſociety injure one another, they are reſtrained from doing themſelves juſtice by their own force and at their own diſcretion; becauſe under the notion of doing themſelves juſtice, they might poſſibly injure others; and not becauſe they are obliged to ſet ſtill, whatever they ſuffer: for civil ſociety, though it does not allow the ſufferers to redreſs themſelves, makes a proviſion for redreſſing them by means of the public force under the conduct of the public underſtanding. But where the governours of the ſociety, who have the keeping of the public underſtanding, and act with the public force, injure the members of it by tyranny and lawleſs oppreſſion; the ſocial means of redreſs fail; and no other means are left, beſides reſiſtance. It is true indeed, that in a ſociety, where the people have recourſe to theſe means, there is no ſocial peace and order. But it is equally true, that the ſocial peace and order are not broken in upon by ſuch reſiſtance as is lawful: for reſiſtance is then only lawful, when this peace and order have been already broken in upon by tyranny and oppreſſion. Some ſort of peace and ſubordination may indeed ſubſiſt in a civil ſociety, notwithſtanding the governours of it violate all the ſocial rights of the people; provided the people will ſet

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ſtill and will quietly ſubmit to the injuries, which they ſuffer. But this is not ſocial peace and order: for ſuch peace and ſuch order, as mankind intended to produce and to ſecure by civil union, are diſturbed by tyranny and oppreſſion. The right of reſiſtance therefore, as it does not take place, till ſocial peace and order are thus diſturbed, cannot be the cauſe which diſturbs them: it finds them diſturbed already; and its proper end is to reſtore them for the preſent, and to ſecure them for the future.

Before we enquire what St. Paul has taught us upon this head; it will be proper to remind the reader, that the right, which is here contended for, does not imply, that all forcible reſiſtance of the members of a civil ſociety againſt the governours of it is lawful, or that the governours have no authority and that the people owe no ſubjection. On the contrary we maintain, that the governours of a civil ſociety have authority to command and to compel, and that the people are obliged of right to obey and to ſubmit, as far as the purpoſes of civil union extend. Though a right of reſiſtance begins beyond theſe limits; becauſe the civil power of the governours and the civil ſubjection of the people end here; yet all reſiſtance within theſe limits is contrary to the law of nature, that is, to the duty, which naturally ariſes from ſocial union and the appointment of civil governours. When St. Paul therefore [k] enjoyns ſubjection, and forbids reſiſtance, the queſtion is, What ſort of ſubjection he enjoyns; and what ſort of reſiſtance he forbids? Whether he enjoins only ſuch ſubjection, as is properly called civil ſubjection, and is limited by the ends, for which mankind formed

[k] Rom. XIII.

themſelves

themſelves into civil ſocieties, or ſuch abſolute ſubjection, as is implyed in the notion of paſſive obedience? Whether he forbids all reſiſtance whatſoever, even againſt ſuch tyranny and oppreſſion, as is deſtructive of the ends of ſocial union; or ſuch reſiſtance only, as the law of nature has forbidden, a reſiſtance to the governours of a civil ſociety, where the nature and deſign of ſocial union has given them authority to command and to compel, and has obliged the people to obey and to ſubmit?

Many of the firſt converts to chriſtianity imagined, that their religion had ſet them free from all ſubjection whatſoever; that it diſcharged them both from the ſubjection, which they formerly owed to the civil magiſtrate, as they were members of ſociety, and likewiſe from the ſubjection, which they owed to their maſters, if they happened to be in a ſtate of ſlavery, before they embraced it. If we read the apoſtolical epiſtles with any degree of attention, we ſhall ſee planely, that this opinion generally prevailed at the time, when they were written, and that the writers of them took particular care to diſcourage and to diſprove it. From the authority of St. Paul, when he commands "every ſoul to be ſubject to the higher powers", we may collect, that this opinion is falſe, but we can collect nothing farther. By giving this command he determines, that the obligation of civil ſubjection extends to all mankind, to chriſtians, as well as to other men: but he does not determine, either that the ſubjection, which is due to ſupreme civil governours, is abſolute and unlimited in its own nature, or that it was the deſign of the goſpel to make it ſo.

Perhaps the reaſon, upon which St. Paul ſupports the precept of ſubjection, may induce you to think, that the ſubjection, which he enjoyns, is abſolute; though the words of the precept do not favour this opinion. The principle, upon which he enforces this duty, is, "That there is no power but of God, the powers, that be, are ordained of God:" you may therefore imagine, that nothing leſs than abſolute ſubjection can be due to a power, which is eſtabliſhed by ſo high an authority. But though he informs his readers, that the authority of God is the ultimate cauſe of their obligation to be ſubject to ſupreme governours; it is your inference and not his, that this ſubjection muſt be abſolute and unlimited. The power of ſupreme governours is eſtabliſhed by the authority of God in the ſame manner, that any other power or right, which ariſes out of human compacts or human laws, is eſtabliſhed by the ſame authority. They are the ordinance of man in their immediate origin: becauſe their power is immediately derived from thoſe compacts and laws of mankind, by which they united themſelves into civil ſocieties, and eſtabliſhed certain forms of civil government. But they are ultimately the ordinance of God: becauſe the law of nature and of God requires the obſervance of theſe compacts and laws, in the ſame manner that it requires the obſervance of all other obligatory acts of mankind, which are duly engaged in for beneficial purpoſes. You muſt underſtand St. Paul in this ſenſe, when he calls civil governours the ordinance of God; or otherwiſe you will not eaſily reconcile him with St. Peter, who calls them the ordinance of man. Thus the reaſon, upon which he enforces the duty of civil ſubjection, will

leave

leave you to collect the meaſures of it from the nature and ends of civil union. The authority of God only confirms and eſtabliſhes the power, which mankind have given to civil governours, and does not give them any extraordinary power beyond this. The extent therefore of their authority, and the ſubjection, which is due to them in conſequence of it, muſt be determined by theſe human compacts and human laws, from which it is derived.

If you object, that the principle, which is here urged by the apoſtle, will anſwer no purpoſe, when it is thus explaned; the objection is partly true and partly falſe. This principle will anſwer no purpoſe, when you alledge it to prove the duty of paſſive obedience and unlimited ſubjection. But it will fully anſwer the purpoſe, for which he alledges it, and will clearly demonſtrate the point, that he had undertaken to prove. We may learn from his own words what this point is. "Let every ſoul be ſubject to the higher powers". He undertakes to prove, not that the obligation of civil ſubjection extends to every act, which civil governours may poſſibly be led to do by an arbitrary purſuit of their own private intereſt, or by an undue indulgence of their paſſions and appetites, but that it extends to every ſoul, to chriſtians, as well as to others. When he [1] elſewhere addreſſes himſelf to ſlaves, he commands them to "ſubmit themſelves to their maſters in all things". But when he addreſſes himſelf here to members of civil ſocieties, the extent, which he gives to civil ſubjection, does not relate to the matter of it, but only to the perſons concerned in it: he does not command them to be ſubject to the

[1] Col. III. 22.

higher powers in all things, but only enjoyns ſubjection as a duty, to which all perſons are obliged. His plane deſign is to correct the miſtaken notion, which then prevailed amongſt the new converts, that the goſpel had diſcharged them from civil ſubjection. And the principle, which he alledges, affords an unanſwerable argument againſt this notion. As the goſpel had not diſcharged them from the duty, which they owed to God; they could have no reaſon to ſuppoſe, that it had diſcharged them from the duty of civil ſubjection: for civil governours are the ordinance of God: and conſequently the duty of ſubjection to ſuch governours is eſtabliſhed by his authority.

Look farther into St. Pauls diſcourſe, and you will find, that he repreſents civil authority, and the ſubjection, which is due to it, as limited to the ends and purpoſes of ſocial union. "Rulers, he ſays, are not a terror to good works, but to the evil. Wouldeſt thou then not be afraid of the power? do that, which is good; and then thou ſhalt have praiſe of the ſame: for he is the miniſter of God to thee for good. But if thou doeſt that, which is evil, be afraid: for he beareth not the ſword in vain: for he is the miniſter of God, a revenger to execute wrath upon him, that doeth evil". You ſee in what light St. Paul conſiders civil governours, whilſt he enjoyns the duty of ſubjection: the rulers, that he is ſpeaking of, are ſuch as no man, who does what is good, need be afraid of. You ſee likewiſe how far and in what reſpects he conſiders civil governours as the ordinance of God: they are miniſters of God for good to thoſe, who do well, and miniſters of God for wrath to thoſe, who do evil. If therefore we were to contend, that obedience and

ſubmiſſion

ſubmiſſion are not due to civil governours, when they are conſidered in this character; you might urge either the authority of St. Paul to over-rule our opinion, or the principle, from which he argues, to confute it. But if you carry the notion of ſubjection farther, than he has carryed it; neither his authority, nor the principles, from which he argues, will be of any uſe to you. He enjoins, that every ſoul ſhould be ſubject to the higher powers: but whilſt he enjoyns this duty of ſubjection, he conſiders theſe powers as patrons of what is good, and as a terror to what is evil; that is, he conſiders them as purſuing the purpoſes of ſocial welfare and ſocial ſecurity. You cannot therefore alledge his authority in favour of a like duty of ſubjection, when they counteract and defeat thoſe purpoſes, and become patrons of what is evil, and a terror to what is good. The principle, from whence he argues in ſupport of the ſubjection, that he enjoyns, is, that civil governours are the ordinance of God: but he informs his readers at the ſame time, how far and in what reſpects he conſiders theſe higher powers as the ordinance of God: they are miniſters of God for the purpoſes of ſocial ſecurity and ſocial welfare, for the puniſhment of evil doers and for the praiſe of them, that do well. You cannot therefore infer from this principle, as he has explaned and limited it, that there is the ſame obligation to ſubjection, where they counteract and defeat theſe purpoſes by making themſelves, what man never deſigned them to be, and what Gods ordinance never made them, the miniſters of their own malice or revenge, of their own avarice or ambition, of their own luſt or cruelty.

If St. Pauls notion of civil ſubjection does not favour your doctrine of unlimited ſubmiſſion and paſſive obedience, you will gain very little advantage to your cauſe by having recourſe to what he ſays about reſiſtance. "Whoſoever therefore reſiſteth the power, reſiſteth the ordinance of God; and they, that reſiſt ſhall receive to themſelves damnation". The words indeed are general; and if you take them ſeparately, they may ſeem to import, that all reſiſtance to civil governours is unlawful; as well where they exceed the limits, which are ſet to their power by the purpoſes of ſocial union, as where they act within theſe limits, and purſue theſe purpoſes. But if you obſerve the manner of expreſſion, you will find, that the words, now in queſtion, contain a conſequence, which the apoſtle deduces from what he had been ſaying before. He had before enjoyned the duty of ſubjection; and from this duty he here infers the unlawfulneſs of reſiſtance. But we cannot ſuppoſe, when he thus infers the unlawfulneſs of reſiſtance from the duty of ſubjection, that he deſigned to make the conſequence more general than the premiſes, or that he meant any other ſort of reſiſtance, beſides what is contrary to the duty of ſubjection, which he had before enjoyned. Since therefore the duty of ſubjection, which he had before enjoyned, is limited by the purpoſes of ſocial union; his meaning, when he infers from this duty, that reſiſtance is unlawful, muſt be reſtrained by the ſame limitations. You conſider ſupreme governance as the ordinance of God in whatever they do. If this principle of yours was true, the conſequence would be, that to reſiſt ſupreme governours in any thing would be to reſiſt the ordinance of God. But St. Paul has ſhewn

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us, in what ſenſe and how far he conſidered them as the ordinance of God, by repreſenting them as the miniſters of God only for the purpoſes of ſocial welfare and ſocial ſecurity. And the only conſequence, that will follow from the apoſtles principle, is, that to reſiſt them, where they act for theſe purpoſes, is to reſiſt the ordinance of God.

There is however no reaſon to think, that the word — damnation, — which our engliſh tranſlators have here made uſe of to expreſs what St. Paul declares to be the event of ſuch reſiſtance, as he forbids, ought to be ſoftened into the milder word — condemnation — and to be explaned, as if he only meant, that they, who are guilty of ſuch reſiſtance, will be puniſhed for it by the civil power, which they reſiſt. Though unjuſt oppreſſion and tyrannical cruelty may lawfully be reſiſted; yet there certainly is ſuch a thing as criminal reſiſtance or rebellion. This criminal reſiſtance is what St. Paul is here ſpeaking of: and ſince he declares it to be contrary to the law of God; we may reaſonably believe, that, when he ſpeaks of damnation as the event of it, he means, that they, who are guilty of it, will incur ſuch penalties of this law as the word — damnation — in the uſual ſenſe of it imports. It would indeed be unſuitable to the whole tenor of St. Pauls argument to ſuppoſe, that he only warns them of what they are likely to ſuffer from the ſword of the civil magiſtrate. He ſet out with enjoyning, that every ſoul ſhould be ſubject to the higher powers; becauſe theſe powers are eſtabliſhed by the authority of God: and it would be a ſtrange inference from hence, that, if we tranſgreſs this duty by rebellion, we ſhall ſuffer for it by the act of man. His general con-

cluſion is, that "we muſt needs be ſubject, not only for wrath, but alſo for conſcience ſake": and, though the external ſanction of human puniſhment is a reaſon, why we ſhould "be ſubject for wrath"; yet unleſs in what went before he had taken notice of ſome other ſanction, beſides this, the principal part of his concluſion, "that we muſt be ſubject for conſcience ſake", would be unſupported.

When [m] Grotius alledges the authority of St. Peter in this queſtion, he does not quote the apoſtles words fairly. "Servants, ſays St. Peter, be ſubject to your maſters with all fear, not only to the good and gentle, but alſo to the froward: for this is thankworthy, if a man for conſcience towards God endure grief ſuffering wrongfully". This exhortation is planely addreſſed to ſlaves: the meaſures of ſubjection therefore, which are to be collected from it, relate only to ſervile and perfect ſubjection. But Grotius in order to apply it to civil ſubjection, introduces it with the apoſtles command of "honouring the king", which has no connection with it, but is the cloſe of what went before. St. Peter is ſo far from countenancing this application, that on the contrary, when he addreſſes himſelf to the members of civil ſocieties, he limits the authority of civil governours, and conſequently the duty of civil ſubjection, to the purpoſes of ſocial welfare and ſocial ſecurity. In ſhort the doctrine of St. Peter and of St. Paul is the ſame in both caſes. When they are ſpeaking to ſlaves; the former ſays, "Servants, be ſubject to your maſters with all fear, whether they are gentle or froward; and the latter ſays, "Servants, be ſubject to your own maſters in all things". But when they are

[m] Ibid. § IV.

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ſpeaking to members of civil ſocieties; the former ſays, "Submit yourſelves to every ordinance of man for the Lords ſake, whether it be to the king as ſupreme, or unto governours, as unto them, that are ſent by him, for the purpoſe of puniſhing evil doers, and for the benefit and encouragement of them, that do well"; and the latter ſays, "Let every ſoul be ſubject to the higher powers, becauſe they are the miniſters of God for the benefit and encouragement of thoſe, who do what is good, and for wrath to thoſe, who do what is evil".

But Grotius, though he favours the doctrine of paſſive obedience in ſome inſtances, does not maintain this doctrine in its full extent and utmoſt rigour. Whilſt he ſuppoſes the duty of non-reſiſtance to be eſtabliſhed by a general law of civil ſociety, he allows, as we have ſeen already, that this law admits of exceptions, both where the conſtitution of civil government has given the people a part of the ſupreme power, and likewiſe where it has expreſsly reſerved a right of reſiſtance upon ſome certain events. The only point therefore, in which the opinion here advanced differs from his, is, that in his opinion ſupreme civil power is unlimited in itſelf, and conſequently they, who are in poſſeſſion of it cannot of right be reſiſted; unleſs ſome expreſs limitations have been ſet to their power, or ſome degree of liberty has been expreſsly reſerved to the people, by the conſtitution: whilſt we on the contrary maintain, that even ſupreme civil power is limited in its own nature by the ends and purpoſes of civil union, merely becauſe it is only civil power; and that the ſubjection, which is due to this power, is limited in the ſame manner and for the ſame reaſon: ſo that

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they, who are poſſeſſed of this power, may of right be reſiſted by the people, when they exceed theſe limits and counteract theſe purpoſes; though no expreſs limitations of their power, and no expreſs reſerves of the peoples liberty, have been made by the conſtitutional form of civil government. [n] Grotius indeed ſo far agrees with us upon this point, as to allow, that the general law of non-reſiſtance admits of a farther exception in caſes of neceſſity; or that the people have a right in ſuch caſes to reſiſt even ſupreme governours. But then he does not deduce this right, where he thus allows of it, from the nature of civil power or of civil ſubjection, but from an arbitrary reſerve, which he ſuppoſes to have been tacitly made by mankind, when they united into civil ſocieties; though they have afterwards made no expreſs reſerve, when the reſpective conſtitution of each ſociety was ſettled. He argues, that the univerſality of his ſuppoſed ſocial rule or law, which forbids reſiſtance, is no reaſon againſt its admitting the equitable exception of neceſſity: becauſe even the laws of God, though they are expreſſed in the moſt general and comprehenſive terms, admit of the like exception. Our Saviour allow of it in the inſtance of the ſabbath, and mentions with approbation a ſimilar allowance in the caſe of David, who was permitted by the high prieſt to eat the ſhew-bread. For though God has an undoubted right to require, that we ſhould obey his laws, even at the expence of our lives; yet if he has not declared, that he requires ſuch a ſtrict obedience to any particular law, and if at the ſame time the matter of the law does not appear to be of ſuch high importance, as will lead us to think, that he requires

[n] Ibid. § VII.

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it; even his laws are underſtood to admit of an exception in favour of neceſſity, whether this exception is particularly mentioned or not. But if caſes of neceſſity are thus excepted out of laws, which are preſcribed by the authority of God, there is more reaſon for preſuming, that they are excepted out of laws, which are preſcribed only by the authority of man. Human laws may indeed require obediences even at the hazard of our lives: of this ſort are military laws, which require a ſoldier to maintain his poſt, to whatever danger it expoſes him, and puniſh him with death, if he deſerts it. But we cannot upon any ſlight grounds ſuppoſe an human law to be thus rigid. It ſeems more probable, ſays our author, that mankind in reſpect of one another have no authority to over-rule this exception of neceſſity; unleſs where an equal neceſſity on the other ſide requires, that it ſhould be over-ruled: becauſe all human laws either are made, or ought to be made, with a proper regard to human weakneſs. What Grotius here calls the general law of civil ſociety, is nothing elſe but the rule of action, which ariſes out of ſocial union. The extent of this law therefore muſt, as he argues, depend upon the will of thoſe, who aſſociate themſelves into civil communities. And if they were to be aſked, whether they intend to bind themſelves not to reſiſt their civil governours, even though they muſt otherwiſe cauſeleſsly and unjuſtly ſuffer death; he thinks it unlikely, that they would anſwer in the affirmative. In the mean time he doubts, whether it might not have been their intention to lay themſelves under even this rigid obligation in all caſes, where they could not reſiſt ſuch violence, without producing confuſion in the ſtate, and occaſioning the deſtruction of many innocent perſons.

Grotius

Grotius was aware, that as he thus reſts the peoples right of reſiſtance, as far as he allows them to have any ſuch right, upon the preſumptive intention of mankind, when they form themſelves into civil ſocieties, the rigid defenders of paſſive obedience would have an opportunity of objecting, that it is a divine and not an human law, which obliges mankind rather to ſubmit to death, than to repel the lawleſs violence of their civil ſuperiours by force. He had in ſome meaſure obviated this objection before, if the foundation of it was true, by obſerving, that even the laws of God admit of exceptions in favour of extreme neceſſity. But he adds here, that the objection is raiſed upon a falſe foundation: for mankind were not brought together and united into civil ſocieties by any expreſs command of God, but came together of their own accord, and were induced thus to unite themſelves by a ſenſe of their own inability to guard themſelves againſt violence by their ſeparate ſtrength. Civil power therefore, which is the reſult of this union, was inſtituted by an human act; and the obligation of civil ſubjection is the immediate effect of an human compact and not of a divine law. In ſupport of this opinion about the origin of civil power he alledges the authority of St. Peter, who calls it the ordinance of man, and then obſerves, as we have obſerved above, that, notwithſtanding this ordinance of man, when it is once duly eſtabliſhed, is confirmed by the divine law, and ſo becomes the ordinance of God; yet the authority of God, whilſt it ſupports civil power, and enforces the duty of civil ſubjection, makes no alteration in either of them, but leaves the nature and the limits of them the ſame, that the act of man, from which they immediately aroſe, had originally made them.

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Grotius extends this exception of extreme neceſſity as well to individuals repelling a private injury, as to the body of a community repelling ſuch injuries, as either immediately or in their conſequences affect the public. Barclay, he ſays, who was a warm aſſertor of kingly power, allows, that the body of the people, or ſome very conſiderable part of this body, has a right to defend itſelf againſt the outragious cruelty of its ſupreme governours, notwithſtanding its general ſubjection to them. But for his own part, though he planely underſtands, that in proportion as what is to be preſerved, by an exemption from the obligation of a law, is of more value, the equity, which exempts it, is the ſtronger; yet he declares himſelf to be far from thinking, that even individuals, or however that a minority of the people, are to be condemned, if they defend themſelves by force, under the favour of neceſſity; provided they do it in ſuch a manner, as not to violate the regard, which they owe to the general good of the ſociety.

The character, under which he here ſpeaks of Barclay, may perhaps lead the reader to imagine, that the queſtion concerning the lawfulneſs of reſiſtance, relates only to abſolute monarchies. For this conceſſion will have no particular weight, merely becauſe it is made by a warm aſſertor of kingly power, unleſs the doctrine of paſſive obedience is peculiar to a monarchical form of government. But in fact the queſtion concerning reſiſtance relates equally to all forms of government, except perfect democracies. In all other forms, there is one part of the ſociety, which governs, whilſt the other part is governed: and the governing part is inveſted with the ſupreme power either perpetually or for

for a time. If therefore in an abſolute monarchy, where the king is inveſted with perpetual ſupreme power, the natural limitations of this power will give the people a right to reſiſt him, when he is guilty of tyranny and unſocial oppreſſion; the ſame limitations will, under any form of civil government, give that part of the ſociety, which is in civil ſubjection, a like right to reſiſt the tyranny and unſocial oppreſſion of the governing part. And on the contrary, if theſe limitations will not ſupport a right of reſiſtance in other conſtitutions, they will not ſupport ſuch a right againſt an abſolute monarch.

There is another point ſtill to be examined, which, though it does not belong to natural law, may be proper to be taken ſome notice of.° Our author is of opinion, that whatever right of reſiſtance there may be in other inſtances, the goſpel has made it unlawful for chriſtians to defend themſelves by force, where they are perſecuted by their ſuperiours even to death upon account of their religion.

One of the arguments, which he makes uſe of to eſtabliſh this opinion, has nothing elſe to ſupport it, beſides the ſilence of our Saviour. He ſays, that Chriſt, when he allows his diſciples to fly from perſecution, allows no more. But this direction, to avoid perſecution by flying from it, cannot well be conſtrued as a prohibition of all other means. And there is the leſs ground for conſtruing it in this ſenſe; becauſe Chriſt gives ſuch a reaſon for it, as ſhews, that it was not intended to be a general direction to all chriſtians, about what they may lawfully do to ſecure themſelves againſt perſecution, and much leſs to be a reſtrictive direction,

° ibid.

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which ties them down from doing any thing elſe. "When they perſecute you in this city, flee ye into another: for verily I ſay unto you, ye ſhall not have gone over the cities of Iſrael, till the ſon of man be come." We may collect from the reaſon here given, that the direction relates only to them, who were at that particular time commiſſioned to preach the goſpel to the cities of Iſrael; before the ſon of man came in power to caſt off the Iſraelites from being the people of God for rejecting the ſalvation, which was offered to them. Chriſt intended to inform thoſe, whom he then ſent, that the work, upon which they were ſent, did not require them to ſtay in any place, where they ſhould be perſecuted. They were to preach the goſpel in all the cities of Iſrael: and if, when they were perſecuted in one city, they ſhould flee to another, this would be no interruption of the work: becauſe they had more places to preach in, than they could well go through in the time, which was allotted them. There is nothing in any part of the inſtructions then given to the apoſtles, which has the appearance of a deſign to reſtrain chriſtians from making uſe of the ſame means, to defend themſelves againſt ſuffering injuries upon account of their religion, that the law of nature allows in other caſes; except that they were commanded not to take a ſword. And this reſtraint is ſo far from extending to all chriſtians, that we find it to have been afterwards taken off from the apoſtles themſelves in ſuch a manner, as ſhews it to have related at firſt to the particular commiſſion, upon which they were ſent, "When I ſent you, ſays our Saviour, without purſe and ſcrip and ſhoes, lacked ye any thing? And they ſaid, Nothing. But now he that hath a purſe

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let him take it, and likewiſe his ſcrip: and he, that hath no ſword, let him ſell his garment and buy one."

Chriſt however refuſed to be defended by force againſt the injuries, which he ſuffered in his own perſon: and his patient enduring of perſecution is alledged to prove, that chriſtians in general ought to ſubmit with the like patience to any injuries, that they may ſuffer upon account of their religion. When St. Peter had drawn his ſword in the defence of his maſter, he was admoniſhed to put it up again; becauſe all they, that take the ſword, ſhall periſh with the ſword. But no ſtreſs can be laid upon this admonition, as it contains rather a prudential caution, than a rule of duty. It is a matter of temporal intereſt, and not of conſcience, to avoid periſhing by the ſword: the fear of ſuch an evil may produce an external reſtraint; but it cannot, when it is taken alone, produce an internal obligation. The only circumſtance in what paſſed upon this occaſion, that ſeems to affect the preſent queſtion, is our Saviours ready ſubmiſſion to what he was about to ſuffer, and his expreſs refuſal of defence by force. But this circumſtance will be found to be of no importance; if inſtead of conſidering only the naked fact, we attend to the reaſon of his refuſal. "Put up thy ſword into its ſheath. The cup, which my father hath given me, ſhall I not drink it? Thinkeſt thou, that I cannot now pray to my father, and he ſhall preſently give me more than twelve legions of angels? But how then ſhall the ſcriptures be fulfilled, that thus it muſt be?" He argues againſt the lawfulneſs of defending him by force, not from the general nature of the religion, which he taught, but from the particular appointment of providence, which had made it his ſpecial duty to ſubmit to the

the injuries, that were coming upon him. Our Saviours ſubmiſſion therefore, under the limitation, which ariſes from the reaſon of it, does not evince the neceſſity of a like ſubmiſſion, where there is not the ſame or a like reaſon. It will only teach us, that as far as the duty of our particular ſtation or circumſtances is attended with difficulties and hardſhips, whether they ariſe from the injuſtice of men or from any other cauſe, we are obliged as chriſtians to go through that duty patiently, and are not at liberty to decline it or to endeavour by force to releaſe ourſelves from the outward neceſſity of performing it, upon account of thoſe difficulties and hardſhips. Grotius falls in with the common notion, that St. Peter has extended this example to chriſtians in all ſtations and all circumſtances whatſoever, and makes uſe of this apoſtles authority as his ſecond argument to ſhew, that however allowable it may be in caſes of neceſſity to reſiſt the ſupreme power in other inſtances; yet where we ſuffer for the religion of Chriſt, no neceſſity will juſtify reſiſtance. For St. Peter having exhorted "ſervants to be ſubject to their maſters, to the froward as well as to the gentle, and to take ill uſage patiently, enforces his exhortation by obſerving, that they were hereunto called: becauſe Chriſt alſo ſuffered for us, leaving us an example, that we ſhould follow his ſteps; who, when he was reviled, did not revile again; when he ſuffered he threatened not, but committed himſelf to him, that judgeth righteouſly." We muſt allow, that a general rule of behaviour ariſes out of this example, and ſuch a rule, as all chriſtians are obliged to follow. The rule is what was juſt now ſtated at large: whatever hardſhips the duty of our ſtation brings upon us,

we muſt bear them patiently, and muſt not deſert our duty for the ſake of avoiding them. Now abſolute ſubmiſſion is the natural duty of ſlaves; and to ſuch as theſe the apoſtles exhortation is here addreſſed. The occaſion, which led him to preſs the performance of this duty, will ſhew us the great propriety of enforcing it by the example of Chriſt. We have already taken notice of a miſtaken opinion, which then prevailed, that the goſpel releaſes thoſe, who embrace it, from all ſubjection whatſoever, and places them in a ſtate of full liberty. St. Peter therefore, in oppoſition to this opinion, firſt commands ſervants to be ſubject to their maſters, and then informs them, that they miſtook the deſign of chriſtianity: for though ſlavery is a ſtate of hardſhips, yet the religion, which they had embraced, as they might learn from the example of its author, was not deſigned to releaſe them from the duty of their ſtation upon account of any hardſhips, that attend the performance of it. I would not be underſtood to mean, that this example of Chriſt can be applyed only to ſlaves, and that no others are obliged to follow it. The general rule, which ariſes from it, is applicable to all perſons in every ſtation; where the duty of their ſtation is attended with hardſhips. But before it can be applyed, as Grotius applys it, to prove that we are not at liberty, as we are chriſtians, to reſiſt the unſocial injuries, which we ſuffer from our civil governours upon account of our religion; abſolute ſubmiſſion to all the unſocial injuries, which they can bring upon us, muſt be ſhewn to be the duty of our ſtation as we are members of civil ſociety. If ſuch abſolute ſubmiſſion is a duty, which naturally ariſes out of civil ſubjection, the example of Chriſt will ſhew us, that he re-

religion does not diſcharge us from it. But if our ſtation does not naturally require it of us, the religion of Chriſt does not enjoyn it; whether we ſuffer unjuſtly by the unſocial oppreſſion of our civil governours upon account of this religion or upon any other account; and the example of Chriſt is out of the queſtion.

Grotius in ſupport of the doctrine of paſſive obedience and non-reſiſtance, when we are perſecuted for the religion of Chriſt, urges in the laſt place, that St. Peter exhorts us to rejoyce, when we ſuffer as chriſtians. But if this would prove any thing in the preſent queſtion, it would prove too much. Grotius allows, that Chriſt has permitted us to ſave ourſelves from perſecution by flight: and yet, if the apoſtles exhortation to rejoyce, when we ſuffer as chriſtians, would prove, that the members of a civil ſociety have not the ſame right to reſiſt the unſocial injuries, which are done them upon account of their religion, that they have to reſiſt the like injuries, which are done them upon any other account, the ſame exhortation would prove, that they ought not to fly from perſecution. For if rejoycing in ſufferings is inconſiſtent with endeavouring to repel them; it is equally inconſiſtent with endeavouring to avoid them. But mankind are forced in fact to ſubmit to many evils, which of right they might repel or avoid; if it was in their power: and chriſtians, like other men, are expoſed to ſuch evils as theſe, ſometimes upon other accounts, and ſometimes upon account of their religion. When we are in theſe circumſtances we have need of conſolation: and the apoſtle gives us this conſolation, if we are brought into them upon account of the religion of Chriſt, by aſſuring us, that ſuch ſufferings are matter of rejoycing;

becauſe they will be amply recompenſed to us. If this is St. Peters meaning, his exhortation to rejoyce, if we ſuffer as chriſtians, does not determine any thing about the right of repelling or of avoiding perſecution: it is only an encouragement to us to bear perſecution well, and not to deſpare under it, when we cannot ſecure ourſelves againſt it.

Civil judge not neceſſary to fix the point where right of reſiſtance begins.

XV. In the general queſtion concerning the right of reſiſtance, it is uſually objected, that there is no common judge, who is inveſted with authority to determine, between the ſupreme governours and the people, where the right of reſiſtance begins: and the want of ſuch a judge is ſuppoſed to leave the people room to abuſe this right: they may poſſibly pretend, that they are unjuſtly oppreſſed, and upon this pretence may cauſeleſsly and rebelliouſly take up arms againſt their governours; though they are laid under no other reſtraints, and no other compulſion is made uſe of, but what the general nature of civil ſociety or the particular circumſtances of their own ſociety require. But be this as it may; the poſſibility, that a right may be abuſed, does not prove, that no ſuch right ſubſiſts. If we would conclude on the one hand, that the people have no right of reſiſtance; becauſe this right is capable of being abuſed; we might for the ſame reaſon conclude on the other hand, that ſupreme governours have no authority. Whatever authority theſe governours have in any civil ſociety; it was given them for the common benefit of the ſociety: and it is poſſible, that under the colour of this authority they may oppreſs the people in order to promote their own ſeparate benefit.

When they, who make this objection have explaned what they mean by an authorized judge, we ſhall be able

able to determine, whether there is any ſuch judge or not, and how far the nature of civil government or of the right, that we are ſpeaking of, will admit of one. If they mean a civil judge, who is inveſted, either by ſocial union or by conſtitutional appointment, with authority to declare, when the grievances of the people will juſtify reſiſtance; there neither is nor can be any ſuch judge. For in the firſt place, the ſuppoſition, that the civil governours, from whom the grievances came, are inveſted with ſupreme power, makes the notion of ſuch a judge a plane contradiction: becauſe his office, as it would give him a civil power of controling thoſe governours, would imply, that he has a civil power ſuperiour to the ſupreme. And ſecondly the right itſelf cannot in its own nature be ſubject to the juriſdiction of a civil judge: becauſe it is a natural and not a civil right: it is ſo much of the natural right of repelling injuries by force, as is exempted from civil ſubjection.

To this queſtion.—Who ſhall be judge, whether the ſupreme governours act contrary to their truſt? [p] Mr. Lock replys, The people ſhall be judge. If he means, that the people have ſuch a civil juriſdiction in this matter, as gives them, at leaſt in the view of civil ſociety, a right of reſiſtance, whenever they determine for themſelves, that they have ſuch a right; it will be difficult to ſupport the truth of this reply. The ſuppoſition of ſuch a juriſdiction is attended with the abſurdity already mentioned: it implys a civil juriſdiction in the people, which is ſuperiour to the ſupreme. Civil governours, who are inveſted with ſupreme power, are ſometimes ſaid to be accountable to

[p] Locks Works, V. II. p. 245.

God alone: and however exceptionable this rule may be, as it is commonly explaned; we ſhall find it to have ſome truth in it; when it is explaned, as it ought to be. No perſons whatſoever, either ſeparately or collectively, have any civil juriſdiction over ſuch governours; and conſequently they are not accountable to any human ſuperiours as to civil judges. But in the mean time they are not at liberty to do what they pleaſe without any external control. Though they are not accountable to the people as to a civil ſuperiour; yet the people, as far as they are not in ſubjection, have a natural right to repel the unſocial violence of ſuch governours. In the ſame ſenſe therefore, that ſupreme governours are accountable only to God, the people, however they may in other inſtances be accountable to their civil governours, are in the exerciſe of the right of reſiſtance accountable only to God.

The people ſhall indeed be judge, when the ſupreme governours have acted contrary to their truſt. But their right of judging is not founded in civil juriſdiction: it is ſuch a right of judging, as all mankind were poſſeſſed of in a ſtate of natural liberty. Mr. Lock compares the caſe of the people and of the ſupreme governours to the caſe of a private perſon, who appoints a truſtee or deputy to act for his benefit, and aſks, "Who ſhall be judge, whether his truſtee or deputy acts well and according to the truſt repoſed in him, but he, who deputes him, and muſt by having deputed him have ſtill a power to diſcard him, when he fails in his truſt? If this be reaſonable in particular caſes of private men, why ſhould it be otherwiſe in that of the greateſt moment, where the welfare of millions is concerned, and alſo, where the evil, if not prevented,

ed, is greater, and the redreſs very difficult, dear, and dangerous?" In order to ſee, whether this reaſoning is applicable to the point in queſtion, let us conſider, what that point is. The ſupreme governours of a civil ſociety have a right to direct and to compel the people, as far as the purpoſes of ſocial union extend. It is an injury to theſe governours to reſiſt them in the exerciſe of this right: and this injury is ranked amongſt the worſt of crimes, and is called rebellion. But where this right of the ſupreme governours ends; as it does where they exceed the limits of all civil power; the people have a right of reſiſtance. The queſtion then is, who ſhall judge, where the former right ends and the latter begins? Mr. Lock replys, that the people ſhall judge, in the ſame manner, and for the ſame reaſons, that a private perſon, who has appointed a truſtee or deputy to act for his benefit, is the judge, when his truſtee or deputy has failed in the truſt, and may diſcard him for having ſo failed. This indeed is certain, that where I have appointed any perſon to act for me; and he by this appointment acquires no right of his own, but only ſtands obliged to me to act according to my pleaſure and for my ſole benefit; I may diſcard him, whenever I think fit: and ſince, by the ſuppoſition, he has no right in the truſt or no intereſt in it, which is properly his own; I ſhall do him no injury, though I diſcard him without any reaſon. But it is poſſible likewiſe, that my truſtee or deputy, notwithſtanding the appointment comes originally from me, may in conſequence of this appointment acquire a right or intereſt of his own in the truſt. Though this right ſhould be ſo connected with the truſt, as to be forfeited, when the truſt is broken; yet he cannot juſtly be removed

at my pleaſure: it would be an injury to diſcard him, when he had not broken the truſt: becauſe it would deprive him of a right, which is his own. Indeed he holds this right conditionally: he loſes it, whenever he breaks his truſt. But I ſhould injure him, if I was to put him out of the truſt, before this event has happened. Upon this account, if he and I live in a ſtate of civil ſociety, the public will not ſuffer me to take the truſt from him at my own diſcretion, but will judge by itſelf or its magiſtrates, whether he has ſo broken the truſt, as to have forfeited the right, which goes along with it. If we live in a ſtate of nature, where no common judge is provided; then indeed I muſt judge for myſelf: but he on the other hand has the ſame liberty to judge for himſelf: and if he is perſuaded, that the truſt has been faithfully diſcharged; he is not obliged to give up his right upon my ſentence. I am a judge indeed; but I am not an authorized judge: I may determine upon the matter, but I can only determine for myſelf, and have no authority to determine for him. I may likewiſe act upon my own judgment: if I am perſuaded, that he has forfeited the truſt and with it the intereſt, which he had in it; I may endeavour to diſpoſſeſs him by force: but he on the other hand may act upon his own judgment; and if he thinks, that he has not broken the truſt, he may endeavour by force to defend himſelf in the poſſeſſion of that right, which he has in the truſt. Now though we ſhould conſider a ſupreme civil governour as a truſtee for the benefit of the people, yet the truſt is planely of this latter ſort. He has an intereſt of his own in the truſt, or acquires a right of his own by being inveſted with it. The people therefore are not at liberty to diſ-

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card him at pleaſure; as they would be, if he was a truſtee for their ſole benefit. Suppoſe him to incur a forfeiture whenever he breaks his truſt; yet if the people deprive him of it under pretence, that he has broken it, when he has not, they injure him: becauſe by depriving him of the truſt, they deprive him of a right, which they gave him by appointing him to be their truſtee. The queſtion therefore is, who ſhall be judge between him and them, whether he has broken the truſt? Civil ſociety provides no authorized judge between theſe two parties. The people indeed ſhall judge: but they are not authorized judges: the ſupreme governour has the ſame right to judge, that they have, and is not bound to ſubmit to their ſentence. If they are perſuaded, that he acts tyrannically; this perſuaſion may juſtify their reſiſtance: but in the mean time if he is perſuaded, that what he does is within the limits of civil power; this perſuaſion will equally juſtify him in ſupporting his own act. Both parties are naturally obliged to judge by the ſame rule: the arbitrary will of the ſupreme governour is not the meaſure of what he has a right to do; and the arbitrary will of the people is not the meaſure of their right of reſiſtance. Whilſt he acts within the natural limits of civil power, they have no right to reſiſt him: and when he exceeds theſe limits, he has no right to direct or compel them. But each party has an equal right to judge, whether he has kept within thoſe limits, or has exceeded them: and conſequently neither of them are authorized judges in the caſe. Whether the ſupreme governing body conſiſts of a ſingle perſon, as in monarchies, or of a number of perſons, as in other forms of government; if we were to conſider it as a truſtee or deputy for the people, that holds

holds the truſt or deputation precariouſly, and has no right conferred upon it by being appointed to this office; the people would then be authorized judges of the behaviour of this ſupreme body: nothing, which they determined about its behaviour could be wrong: they might remove it from its office for every fault, or for every ſuſpicion, or even without any fault or any ſuſpicion at all. But the governing part of a civil ſociety, whilſt it is a truſtee for the general benefit, is not a precarious truſtee, that has no right of its own, and holds at the will of the part, which is governed. Its power is limited indeed by the purpoſes of ſocial union; ſo that the people are not in ſubjection to it, and may lawfully reſiſt it, when it counteracts theſe purpoſes. But it has a right to this limited power, and cannot be juſtly deprived of it without cauſe, or be lawfully reſiſted in the exerciſe of it. Thus the nature of civil power does not give the people a full and abſolute right to reſiſt or to diſcard their ſupreme governours, whenever they pleaſe, or does not make them final judges by inveſting them with civil authority to determine, when reſiſtance is lawful. Judges they are, but not civil or authorized judges. They judge in this caſe of their own right to reſiſt and of the right of the ſupreme governours to compel, in the ſame manner only, that individuals judge of each others right in a ſtate of nature; where each party is at liberty to make uſe of his own force againſt others, for the ſupport of what appears to him to be his own right: but thoſe others are in the mean time as much at liberty to judge for themſelves, as he is, and are likewiſe at liberty to make uſe of their force to oppoſe his demands, if force is neceſſary, and they are perſu ded, that the demands are unjuſt.

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In ſhort, when the queſtion is, whether the ſupreme governours of a civil ſociety have abuſed their truſt by counteracting the ends of ſocial union; the caſe is of ſuch a ſort, that no civil judge is or can be provided for it. But it does not follow from hence, that there is no judge at all: each of the parties are left to judge for themſelves, as if they were ſtill in a ſtate of nature. Both parties are accountable to God, if they judge wrongly and act upon this judgment: but neither of them is bound to ſubmit to the judgment of the other.

Treaſon and rebellion how guarded againſt, notwithſtanding right of reſiſtance.

XVI. It is a groundleſs ſuggeſtion, that a right of reſiſtance in the people will occaſion treaſon and rebellion; or that it will weaken the authority of civil government, and will render the office of thoſe, who are inveſted with it, precarious and unſafe, even though they adminiſter it with the niceſt prudence and with all due regard to the common benefit. The right of reſiſtance will indeed render the general notion of rebellion leſs extenſive in its application to particular facts. All uſe of force againſt ſuch perſons, as are inveſted with ſupreme power, would come under the notion of rebellion, if the people had no right of this ſort: whereas, if they have ſuch a right, the uſe of force to repel tyrannical and unſocial oppreſſion, when it cannot be removed by any other means, muſt have ſome other name given to it. So that however true it may be, that in conſequence of this right of reſiſtance ſupreme governours will be liable of right to ſome external checks, ariſing out of the law of nature, to which they would otherwiſe not be liable; yet it cannot properly be ſaid to expoſe them to rebellion.

But the great ſtreſs of the preſent queſtion is, not what name the uſe of force to repel unſocial and tyrannical op-

oppreſſion is to be called by, but what effect it will have upon the general ſecurity of thoſe, who are appointed to govern a commonwealth, and upon the authority, which is neceſſary to be kept up, in order to enable them to diſcharge their truſt with benefit to the public. Now the ſecurity of civil governours depends partly upon the conſciences of their ſubjects, and partly upon the natural ſtrength and influence, which they have in their hands. The ties of conſcience procure them obedience and ſubmiſſion upon a principle of duty: and the ſtrength and influence, which goes along with their office, procure the like obedience and ſubmiſſion from ſuch, as would diſregard their duty, if it was not enforced by compulſion. They will have this latter ſecurity to guard their perſons, and to ſupport their authority, whether the people have a right of reſiſtance or not. And in fact there is more danger of their making an undue uſe of their ſtrength and influence, to ſupport themſelves, when they do wrong, than of their wanting a ſufficient ſecurity againſt any attempts of faction, when they do right: it is more likely, that they ſhould have it in their power to compel the people to ſubmit to unſocial oppreſſion; than that they ſhould be in danger of being hurt by rebellion, under the pretence of a right of reſiſtance. But this ſtrength and influence is not their only ſecurity: for as long as they pay a due regard to the common good, the principle of conſcience will procure them ſocial obedience and ſubmiſſion, and will ſupport their authority: becauſe a right of reſiſting lawleſs power can never be a foundation in conſcience for uſing force againſt juſt authority. In ſhort upon whatever principles paſſive obedience and abſolute ſubjection might be obtained,

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if the people had no right of reſiſtance; upon the ſame principles ſocial obedience and civil ſubjection may be obtained, though they have ſuch a right. We cannot ſuppoſe ſupreme governours to have ſtrength enough in their hands to enforce abſolute ſubjection, and to ſecure them in the exerciſe of arbitrary power; without ſuppoſing them to have ſtrength enough to enforce civil ſubjection and to ſecure them in the exerciſe of ſocial power. And if a ſenſe of duty would operate effectually to prevent the people from reſiſting their governours at all; it will certainly operate as effectually to prevent them from reſiſting without a juſt cauſe.

CHAP.

CHAP. IX.

Of the law of nations.

I. *How far the law of nations is a positive law.* II. *Nations are capable of an obligation by compact.* III. *In what sense prescription is a right of the law of nations.* IV. *No evidence of a positive law of nations to be collected from usage.* V. *Law of nations may be found by reason or by testimony.* VI. *Effects of the right of territory.* VII. *Questions about extent of territory belong to the law of nations.* VIII. *No right of territory in things, that do not admit of property.* IX. *Different sorts of war.* X. *Solemn war what, and why called just war.* XI. *Justifying causes of war.* XII. *A nation may be accountable for the act of one of its members.* XIII. *Members of a nation accountable for injuries done by it.* XIV. *One nation may lawfully assist another in war.* XV. *What is lawful in war.* XVI. *Property how acquired in war.* XVII. *What prevents prisoners of war from being slaves.* XVIII. *Effects of a declaration of war.* XIX. *Law of nations in respect of states, that are neutral in a war.* XX. *Privileges of ambassadors how far natural.* XXI. *Public compacts are either treaties or sponsions.* XXII. *Compacts between nations at peace or nations at war.* XXIII. *Equal and unequal compacts of nations.* XXIV. *Compacts of the same matter with the law of nature, or of different matter.*

How far the law of nations is a positive law.

I. IN the general division of laws [a] I have followed Grotius, and have reckoned the law of nations amongst the positive laws of human institution. But though there is enough of positive institution in it to

[a] See B. I. C. I. § XI.

justify

juſtify this diviſion; yet there is reaſon to doubt, whether it is ſuch a poſitive law, as he ſuppoſes it to be.

The law of nations, according to [b] his account of it, is a ſyſtem or collection of rules, which derives its authority from the poſitive conſent of all or of moſt nations. He firſt conſiders the ſeveral nations or civil ſocieties of the world as ſo many collective perſons, who are formed into one great ſociety including all mankind: and then he ſuppoſes the law of nations to be the dictate of the common underſtanding and will of this great body; in the ſame manner, as the civil law of each diſtinct civil ſociety is the dictate of the common underſtanding and will of theſe ſmaller bodies.

If we were only to object here, that in the great ſociety of all nations there is no common ſuperiour inveſted with authority to preſcribe laws; we ſhould not take the matter up high enough. For in a ſociety of equals, where there is no common ſuperiour, who has authority over the whole, [c] the general body of the ſociety taken together is ſuperiour to each of the members taken ſeparately, and has authority to preſcribe laws to each. But this authority, in a ſociety of equals, ariſes from their ſocial union, that is, from the compact, by which they have bound themſelves to act, for ſome common purpoſe, under the direction of the common underſtanding. And the want of ſuch a voluntary union amongſt the ſeveral nations of the world, is the reaſon, why there is in this great ſociety no legiſlative power, or no authority to eſtabliſh poſitive laws.

Some ſort of union there is between all nations: they are all included in the collective idea of mankind,

[b] Grot. L. I. C. I. § XIV. [c] See B. II. C. VI. § I.

and

and are frequently ſpoken of under this general name. But this is not a ſocial union: the ſeveral parts of this collective idea, whether we conſider the great body of mankind as made up of individuals or of nations, are not connected, as the ſeveral parts of a civil ſociety are, by compact amongſt themſelves: the connection is merely notional, and is only made by the mind for its own convenience.

Nature has likewiſe made ſuch a connection between all mankind, as obliges them to abſtain from what is productive of harm to one another, and to do what is productive of mutual good. But this connection, whilſt it is the foundation of the law of nature, cannot without the intervention of ſome ſocial compact be the foundation of any poſitive law. We find, that all mankind, when we conſider them as individuals, are obliged by their condition and circumſtances to do good and to do no harm: but this obligation does not give them any power to preſcribe laws to one another; till they have agreed to unite themſelves into ſocieties. In like manner all nations, when we conſider them as ſo many collective perſons, are obliged to obſerve the ſame law of nature. But this obligation gives them no poſitive legiſlative power over one another: it does not give any one nation, or any number of nations, authority to bind the reſt either to do any thing, which the law of nature has not enjoyned, or to avoid any thing, which this law has not forbidden.

But though, for want of a ſocial union, and conſequently of a legiſlative power, amongſt the ſeveral nations of the world, there cannot be any ſuch poſitive law of nations, as Grotius has imagined; yet the law of nations may be diſtinguiſhed from the law of nature: and the foundation of this diſtinction is laid in general

general agreement and poſitive inſtitution. A number of individuals, who have formed themſelves by mutual compact into one body, under an obligation of acting by the direction of the common underſtanding for ſome certain purpoſes, are bound to conſider themſelves, in reſpect of theſe purpoſes, as one moral perſon. But the reſt of mankind, as they are not parties in this compact, are under no natural obligation to take notice of it, and are ſtill at liberty to conſider and to treat the ſociety as a large company of unconnected and individual perſons. Since therefore in the mutual intercourſe of mankind civil ſocieties are univerſally conſidered and treated by one another, as collective moral perſons; and the ſeveral members of ſuch ſocieties are conſidered and treated, not merely as ſeparate individuals, but as parts of theſe collective perſons; this perſonality, which is thus given to civil ſocieties, muſt be derived from ſome univerſal conſent or agreement of all nations. We ſee ſomething like this within a civil ſociety; when ſome of its members have by compact aſſociated themſelves for a private purpoſe of their own. This compact obliges them to act together, and to conſider themſelves, in reference to this purpoſe, as one collective body or one moral perſon. But the civil community, to which they belong, conſiders them ſtill as ſo many diſtinct individuals. For however the civil law, in the caſe of partnerſhips, may ſupport the particular claim, which the private compact, that is between them, gives the ſeveral partners either upon the common ſtock or upon one another; yet it does not treat the aſſociated body as one moral perſon. Such a body cannot receive a legacy, and cannot ſue or be ſued, in a corporate capacity: it has

not this ſort of perſonality in the view of the ſociety; till it has been incorporated by ſome public act. In like manner a civil community within the great body of mankind, however the members of it may be connected amongſt themſelves by a ſocial compact, is only a large company of unconnected individuals in reſpect of all others, who are not parties to this compact; till mankind by a general or public act have agreed to conſider it as a moral perſon.

This general act of conſent is the foundation of the law of nations, as far as this law differs from the law of nature. The matter of both theſe laws is the ſame: the law of nations, as well as the law of nature, commands whatever is beneficial, and forbids whatever is hurtful to mankind in general. But whilſt the matter of them is the ſame, the objects of them are different: the law of nature conſiders mankind as individual perſons; the law of nations conſiders them as formed into collective perſons. Thus the ſame law, which is called the law of nature, when it is applyed to ſeparate and unconnected individuals, is called the law of nations, when it is applyed to the collective bodies of civil ſocieties conſidered as moral agents, or to the ſeveral members of civil ſocieties conſidered, not as diſtinct agents, but as parts of theſe collective bodies.

Nations are capable of an obligation by compact.

II. The law of nature, in this application of it, is not the only meaſure of the obligations, that nations may be under towards one another. When they are conſidered as moral agents, they become capable, as individuals are, of binding themſelves to one another by particular compacts, or treaties, to do or to avoid what the law of nature has neither commanded nor for-

forbidden. But theſe obligations, which thus differ in their matter from the law of nature, neither ariſe from a poſitive law of nations, nor produce ſuch a law. They ariſe from immediate and direct conſent, and extend no farther than to thoſe nations, that by their own act of immediate and direct conſent have made themſelves parties to them.

In what ſenſe preſcription is a right of the law of nations.

III. In ſpeaking of the right of preſcription [d] I had occaſion to obſerve, that the natural foundation of it is only conjectural, and that the right itſelf would have been precarious and uncertain, if it had not been eſtabliſhed by the general conſent of mankind. But this right, notwithſtanding it is thus eſtabliſhed, will afford us no evidence, that there is a poſitive law of nations, which is diſtinct from the law of nature applyed to civil ſocieties, as if they were moral agents. For the notion of ſuch a law of nations not only ſuppoſes, that it introduces and eſtabliſhes rights, which have no foundation or no certain foundation in nature, but likewiſe that it regards mankind only as they are formed into civil ſocieties. Whereas the general conſent, which eſtabliſhes the right of preſcription, though by aſcertaining this right it produces an effect, which the law of nature without its aſſiſtance would not have produced, regards mankind equally, whether we conſider them as formed into civil ſocieties or as ſubſiſting independently in a ſtate of nature. And if the right of preſcription would take place amongſt individuals in a ſtate of nature, we cannot with any propriety call the general conſent, which eſtabliſhes it, a poſitive law of nations: becauſe the notion of a law of nations, which will ſubſiſt alike, whether any nations ſubſiſt or

[d] See B. I. C. VIII. § VII.

not, is unintelligible. The general conſent, which eſtabliſhes the right of preſcription, is ſo far from being a poſitive law of nations, that it is no law at all. It is a poſitive act of all mankind: but this poſitive act is a compact and not a law. All are bound by it; not becauſe it is done by any legiſlative authority; but becauſe all and each have either expreſsly or tacitly made themſelves parties to it by their own immediate and direct concurrence. If this common act of mankind was a law; it could operate only in conſequence of ſome ſort of ſocial union, by which they, who do not immediately and directly conſent to it, are underſtood to conſent to it remotely and indirectly. But the right of preſcription, as it is eſtabliſhed by general conſent, takes place amongſt independent individuals, who are in ſtate of nature, where there is no ſort of ſocial union, and conſequently where no law can be made, and no common act can be done any otherwiſe than by compact.

The eſtabliſhment of preſcription is like the introduction of particular property. Nature did not appropriate any goods, either moveable or immoveable, to particular perſons by dividing the common ſtock and aſſigning to each perſon his particular ſhare. The claim of property was introduced by a poſitive act of general conſent. But this act of conſent is not a poſitive law of nations. For ſince the right of property, which is the effect of it, takes place amongſt unconnected and independent individuals, it can be no law. And if it was a law, it could not be called a law of nations with any propriety, both becauſe it does not preſuppoſe mankind to be united into nations, and likewiſe becauſe nations are not the peculiar objects of it.

A fixed and ſteady right of preſcription, as it is thus eſtabliſhed by a general compact of mankind in a ſtate of nature, is in the firſt inſtance an adventitious right of the law of nature. But after mankind have formed themſelves into civil ſocieties, and have agreed to conſider theſe ſocieties as moral agents or collective perſons, it then becomes a right, not only of the law of nature, but likewiſe of the law of nations: not becauſe it was either eſtabliſhed at firſt, or is ſupported now, by any poſitive law of nations: but becauſe amongſt independent individuals it is a right of the law of nature; and the law of nations is nothing elſe but the law of nature applyed to the collective perſons of civil ſocieties, as if they, like individuals, were moral agents.

No evidence of a poſitive law of nations to be collected from uſage.

IV. We may reaſonably conclude, that there is no law of nations, which is wholly poſitive, if ſuch a law is no where to be found: for a law, that does not appear, is in effect a law, that does not exiſt. [e] Grotius allows, that a purely poſitive law of nations cannot be traced out, as the law of nature may, from principles of reaſon. It is not derived from the conſtitution of things and the circumſtances of mankind, but from the will and appointment of the legiſlators: and when we are to enquire, what their will and appointment is, in reſpect of ſuch things as are indifferent in themſelves; this is a queſtion of fact and not of reaſon. In civil laws, if they are written ones, authentic evidence of the will of the legiſlator is to be had: the law appears in the original record, and in ſuch copies of this record, as are well atteſted. But ſuch a law of nations, as Grotius contends for, is an unwritten one: there is

[e] L. II. C. XVIII. § IV. L. I. C. I. § XIV.

no original record of it, and no copy of any ſuch record. He therefore directs us, in ſearching for it, to have recourſe to the ſame means, that are made uſe of in ſearching for unwritten civil law, to uſage or cuſtom, to conjectures, and to the judgment and teſtimony of ſkilful perſons.

Now the uſage, in which unwritten civil laws appear, is mere uſage, and conſiſts in immemorial and uninterrupted practice. But if we look into the practice of nations, as it is related in hiſtory, it does not appear in any inſtance to have been conſtant and uniform; that is, no uſage appears, from whence we can collect what the poſitive law of nations is. Grotius was aware of this: and though he ſets out with recommending hiſtory as a principal help for diſcovering the law of nations, yet he afterwards confeſſes, that this help, if we have no other, will be of little ſervice: for ſince it is the buſineſs of hiſtory to record all facts indiſcriminately, we muſt neceſſarily find in it not only ſuch practices of mankind, as are right and proper, but ſuch likewiſe, as are wrong and contrary to law. When this help fails us, as it always will, he directs us to have recourſe to conjectures. But if the practice of nations has been variable and contradictory, all conjectures will be nothing to the purpoſe: they can never make an uſage out of a variable and contradictory practice; and uſage is the only proper evidence of an unwritten law, which is wholly poſitive. It will be as little to the purpoſe, when we aſk, where we may find this poſitive and unwritten law of nations, to tell us, that we may learn it from the judgment and teſtimony of ſkilful perſons. This is no ſatisfactory anſwer to the queſtion; it is only a change of the per-

perſons, about whom the queſtion is aſked. We aſk in the firſt inſtance, where we ourſelves may find the law? and if we are only told, that we may learn it from the judgment and teſtimony of ſkilful perſons, we may ſtill go on to aſk, Where do they find it? Their ſkill cannot diſcover any uſage of nations; where the practice, as hiſtory relates it, is variable and contradictory. Their judgment cannot lead them to the knowledge of the law; where the law is wholly poſitive, and cannot be deduced by the help of reaſon from natural principles. And their teſtimony will prove nothing; where the law is an unwritten one, and conſequently they can have no record of it before them.

Law of nations may be found by reaſon or by teſtimony.

V. But if the law of nations, inſtead of being purely poſitive, is only the law of nature applyed, in conſequence of a poſitive agreement amongſt mankind, to the collective bodies of civil ſocieties as to moral agents, and to the ſeveral members of ſuch ſocieties as to parts of theſe bodies; the dictates of this law may be found by the ſame means, that we make uſe of in ſearching for the dictates of the general law of nature.

In laws, which are purely poſitive, there is no arguing from reaſon to law. We may think, that many things ought in reaſon to be eſtabliſhed by law; whilſt the legiſlator has not eſtabliſhed them in fact, and ſaw no reaſon, why he ſhould eſtabliſh them: and on the contrary he may have eſtabliſhed many things in fact, and for weighty reaſons; where we are not aware of any reaſon at all. But the law of nations is poſitive only in the manner of applying it, and is natural as to its matter; it is the law of nature applyed by poſitive conſent to the artificial perſons of civil ſocieties:

and conſequently the dictates of it are only the dictates of right reaſon, and may be collected by arguing from the nature of things, and from the condition and circumſtances of mankind, when they are conſidered as formed into ſuch ſocieties.

The hiſtory of what has paſſed from time to time, amongſt the ſeveral nations of the world, may likewiſe be of ſome uſe in this enquiry: not becauſe any conſtant and uninterrupted practice in matters, which are indifferent by the law of nature, is to be collected from thence; but becauſe we ſhall there find what has been generally approved, and what has been generally condemned, in the variable and contradictory practice of nations. If the law of nations is founded upon natural principles, and is not merely a poſitive law, which has no other foundation, beſides the will of the legiſlators; the approved practice of mankind will help to inform us what its dictates are. There are two ways, ſays [f] Grotius, of inveſtigating the law of nature: we find out this law either by arguing from the nature and circumſtances of mankind, or by obſerving what has been generally approved by all nations, or however by all civilized nations. The former is the more certain of the two: but the latter will lead us, if not with the ſame certainty, yet with a high degree of probability, to the knowledge of this law. For ſuch an univerſal approbation muſt ariſe from ſome univerſal principle: and this principle can be nothing elſe but the common ſenſe or reaſon of mankind. Since therefore the general law of nature may be inveſtigated in this manner, the ſame law, as it is applyed particularly to nations as to

[f] L. I. C. I. § XII.

moral

moral agents, and is called the law of nations, may be inveſtigated in the ſame manner.

From hence we may ſee what uſe is to be made of the judgment and teſtimony of ſkilful perſons, in theſe enquiries. Their judgment will help to point out the law of nations: becauſe what is approved of by men of prudence, and honeſty, and experience, is more likely to be conformable to the dictates of right reaſon; than what is approved of only by the vulgar, and unthinking, and diſſolute. And their teſtimony will be of weight, as it will be an evidence not only of their own ſentiments, but likewiſe of what they have found upon diligent enquiry to be the general ſentiments of the civilized part of mankind.

It may be neceſſary here to caution the reader againſt imagining, that a law of nations, which is purely poſitive, might be eſtabliſhed, if not by the conſtant and uninterrupted practice, yet by the approved practice of nations. For no practice, which is indifferent in itſelf, and is neither commanded nor forbidden by the law of nature, can be approved for any other reaſon, than becauſe it is conformable to ſome poſitive law. The notion therefore of an approved practice of nations, where the law of nature is ſilent, muſt neceſſarily preſuppoſe the exiſtence of a purely poſitive law of nations: and approved practice, if it preſuppoſes this law, cannot be the cauſe of it. If there is any ſuch law; it muſt have been introduced and eſtabliſhed by mere uſage, which conſiſts in uniform and uninterrupted practice: but we have already obſerved, what our author confeſſes, that in the dealings and intercourſe of nations with one another, as hiſtory relates it, no ſuch uſage is to be found.

As

As we have now ſeen what the law of nations is, and where this law is to be found; there will be no occaſion to detain the reader with a particular examination of the ſeveral caſes, that may ariſe, in the intercourſe of nations with one another. If he underſtands what the law of nature is, when it is applyed to individual perſons in a ſtate of equality, he will ſeldom be at a loſs to judge what it is, when he is to apply it to nations conſidered as collective perſons in a like ſtate of equality. But we may perhaps be miſled in our judgment for want of obſerving, that in the intercourſe of nations ſometimes the civil law of each nation, and ſometimes the general law of nature, which conſiders the ſeveral members of a civil ſociety, not as parts of a collective perſon, but as ſo many individual perſons, is the proper meaſure of what is right and what is wrong. It may therefore be neceſſary to conſider ſuch of the leading caſes, as will help to point out the diſtinct provinces of theſe ſeveral laws.

Effects of the right of territory.

VI. A nation [g] by ſettling upon any tract of land, which at the time of ſuch ſettlement had no other owner, acquires, in reſpect of all other nations, an excluſive right of full or abſolute property not only in the land, but in the waters likewiſe, that are included within the land, ſuch as rivers, pools, creeks, or bays. This abſolute property of a nation, in what it has thus ſeized upon, is its right of territory.

When I ſay, that a nations right of territory conſiſts in the abſolute ownerſhip of the land, where it has ſettled, or of ſuch waters, as are an appendage to the land; I mean its right of territory, as far as other nations, or the members of other nations are

[g] See B. I. C. III. §XIII. B. II. C. V. § III.

affected

affected by this right. For in reſpect of its own members, its right of territory conſiſts, not in an abſolute, but in a paramount, property. Occupancy in the groſs gave the nation from the firſt a right of abſolute property in the land, where it ſettled. But a ſubſequent diſtribution and aſſignment, or a ſubſequent occupancy in parcels, gives the ſeveral members of the nation private property in their reſpective ſhares. This private property, which they acquire by the aſſignment of the public, or by their own particular occupancy with the leave of the public, though it implys a right to uſe what is thus acquired, and to diſpoſe of it, is not ſtrictly a right of full property or abſolute ownerſhip. It is property; becauſe it is an excluſive right, in reſpect of all other individuals, to uſe the land, and to diſpoſe of it: but it is not full or abſolute property in the ſtricteſt ſenſe; becauſe the public has a right to limit and to direct the uſe and diſpoſal in ſuch a manner, as the common ſafety and welfare require. This right of the nation is a ſort of property: it is an excluſive right in reſpect of all other perſons whatſoever, whether individual or collective, to direct the uſe and the diſpoſal of the land for the purpoſes of ſocial union. And this ſort of property, as it is thus diſtinguiſhed from private ownerſhip, is what our author calls paramount property. But after the lands, which the nation has acquired, are thus diſtributed amongſt the ſeveral members of it, and are held by them in private ownerſhip, ſo that nothing beſides paramount property remains to the public in reſpect of its own members; the nation, conſidered as one collective perſon, has ſtill in reſpect of all other nations, and of all other individuals, an excluſive right of full property in the whole tract of land: not only becauſe what paſſes within the nation,

nation, the manner, in which it parcels out the country, where it ſettles, amongſt its own members, and the terms, upon which they hold their ſeveral ſhares, does not fall under the notice of foreigners; but likewiſe becauſe, when all the members of the ſociety are conſidered as one collective perſon, the whole property of the land, as well what has been granted by the public to its ſeveral parts, as what remains in the public itſelf, is veſted in this collective perſon.

In conſequence of this excluſive right of property, which a nation has in its own territories, the law of nations is not the only meaſure of what is right or wrong in the intercourſe of nations with one another. This right of territory extends the authority of civil law to all queſtions, which relate to the uſe or the private ownerſhip of ſuch moveable goods, as are within the territory of the nation, and of ſuch immoveable goods, as are confeſſedly a part of its territory; whether its own members only are concerned in theſe queſtions, or the collective bodies or the individual members of other nations. Thus every ſtate has authority to determine by poſitive laws, upon what occaſions, for what purpoſes, and in what numbers, foreigners ſhall be allowed to come within its territories, to exclude them from trading there at all, or to regulate their trade, to leave them under their natural incapacity of inheriting immoveable goods or to remove this incapacity, to prevent them from inheriting moveable goods, or to preſcribe the conditions, upon which they may inherit.

Civil laws, when they cauſeleſsly and unreaſonably exclude foreigners either from coming into the territories at all or from trading there, are inhoſpitable.

But

But theſe inhoſpitable civil laws are no otherwiſe contrary to the law of nations, than as this law, like the general law of nature, enjoyns the duties of humanity and benevolence. Every nation has by the law of nations, as every individual has by the law of nature, a right to judge for itſelf, how far its intercourſe either of the commercial or of the friendly ſort is likely to be detrimental to itſelf. So that to cut off either or both ſorts of intercourſe will be no act of injuſtice; though it will be wrong, if it is done cauſeleſsly. A nation has a moral power to withold its benevolence; and they, from whom it is withheld unreaſonably, though they are not treated kindly, are not injured.

Inhoſpitality amongſt nations is leſs uſual now, than it was in early times. Indeed every nation might rather be ſaid to uſe a prudent and neceſſary caution for its own ſecurity, than to be guilty of a breach of hoſpitality, by excluding foreigners from coming into its territories; when upon account of the frequent practice of piracy and robbery there was ſuch a ſtrong preſumption, that all ſtrangers came for theſe purpoſes, as made it no incivility to aſk ſtrangers, whether they were not free-booters, and to call them, in the common way of ſpeaking of them, by the name of enemies. [h] Cicero gives a different turn to this kind of language. He remarks that ſuch a perſon, as ſhould properly be called *perduellis*, or an enemy, was in the early times of Rome called *hostis*, which appears from the XII tables to ſignify a ſtranger. This, he ſays, was a tenderneſs of expreſſion: an enemy was called by the milder name of a ſtranger with a deſign to abate the odiouſneſs of the character. But

[h] De Offic. L. I. C. XII.

Grotius

[i] Grotius ſeems to have given a juſter account of the matter, when he conſiders this rather as a harſhneſs of expreſſion towards ſtrangers, than as a tenderneſs of expreſſion towards enemies. An enemy in the old language of Rome was called a ſtranger, not becauſe they, who uſed this language, intended to compliment their enemies with the tender name of ſtrangers; but becauſe in thoſe early ages they conſidered every ſtranger as an enemy.

Though the civil laws of every nation are the proper meaſure of the right, which foreigners have to make uſe of its territories, for any purpoſe whatſoever; yet theſe laws, like all others, admit and require the equitable exception of neceſſity. If the civil laws have forbidden any particular foreigners to come within the territory, or to bring any particular goods into any of its ports, or to come into any of them with a ſhip of force, under a certain penalty; foreigners, who ſtray thither by land, or whoſe ſhips are driven into the ports by ſtreſs of weather, may by the letter of the law be ſubjected to the penalty, but the equitable rules of interpretation will exempt them from it.

In conſequence of the property, which every nation has in its own territories, the rights of harmleſs profit amongſt nations are of the ſame ſort, and are under the ſame limitations, with the like rights amongſt individuals in a ſtate of nature. They are rights, which may be maintained in theory; but the nature of them renders them precarious in their exerciſe. This matter has been explaned already in its [k] proper place. But we may add here, that though a paſſage for the goods of merchants or traders through the territories of a na-

[i] L. II. C. VII. § XIV. C. XV. § V.

[k] See B. I. C. V. § VIII. IX.

tion

tion, either over the land, or upon the rivers, or upon ſuch arms of the ſea, as are appropriated, is commonly reckoned amongſt the claims of harmleſs profit; yet it is conſiſtent with the law of nations to demand ſome toll or other acknowledgment for ſuch paſſage. Grotius allows, that all payments of this ſort are juſt, as far as they have any relation to the ſafety of the goods or other benefit of the trader. If a nation upon account of ſuch a paſſage is at expence in keeping up a road by land, or in reparing locks and ſluices for the convenience of navigation, or in maintaining light-houſes upon the coaſts, or in guarding the traders by an armed force againſt pirates or other robbers; ſo much may undoubtedly be required of foreigners in their paſſage, as will repay theſe or the like expences. But the nature of all rights of harmleſs profit will lead us one ſtep farther: for ſince bare paſſage through the territories of a nation, though it ſhould occaſion none of theſe expences, cannot be claimed without the conſent of the nation; if it is in any degree probable, that the nation by granting ſuch paſſage will loſe an advantage, which it might have made for itſelf; there is no injuſtice in demanding toll upon this conſideration.

Queſtions about extent of territory belong to the law of nations.

VII. Where a queſtion ariſes between two nations about the extent of their reſpective territories, that is, about their reſpective right to this or that tract of land; the civil law of either nation cannot be the proper meaſure, by which the controverſy is to be determined. The general property of a nation in its own territory, as it is an excluſive right to a certain tract of land, implys a right to preſcribe to all others, whether they are nations or individuals, the conditions, upon which they ſhall be allowed to make uſe of this tract

tract of land, or to take part of it in private ownerſhip. By this accident the authority of the civil law of the nation is extended beyond its own members: and if foreigners want to uſe or to acquire in private property what belongs to the nation, they muſt ſubmit to uſe or to acquire it upon ſuch terms as the nation will agree to. But when the queſtion is about the right of territory itſelf, whether ſuch a particular tract of land is included in the general property of the nation or not; the civil law of the nation has no authority in this queſtion. The authority of the civil law can extend no farther than the nations juriſdiction. But as it has no direct juriſdiction over the perſon of the other party in the diſpute, that is, over the collective body of the other nation; ſo neither has it any indirect juriſdiction over this other party, by having a direct juriſdiction over the thing in queſtion; becauſe the queſtion is, whether it has any ſuch direct juriſdiction over the thing or not.

In a ſtate of natural equality a controverſy between two individual perſons, about the extent of their reſpective property, muſt be decided by the law of nature. In like manner the law of nations is the rule for deciding a like controverſy, where the contending parties are two nations, and the matter in queſtion is the extent of their reſpective territories or general property. But ſince the law of nations is only the law of nature applyed to the collective perſons of civil ſocieties, and theſe collective perſons are, in reſpect of one another, in a ſtate of natural equality; if we know, what the law of nature would determine in any caſe between individuals, the law of nations will in like circumſtances determine in the ſame manner between civil ſocieties.

Expreſs

Expreſs compacts, by which two nations have ſettled the bounds of their reſpective territories, are binding upon the nations, and will aſcertain their reſpective claims. For want of ſuch expreſs compacts recourſe muſt be had to uſage, which is a tacit compact. The mere cultivation, or other uſe, of the land by the members of one of the nations will prove occupancy: but if the land, which is thus ſeized, was at the time of ſeizing it a part of the territory of the other nation; ſuch cultivation does not prove property. All occupancy gives poſſeſſion; but in order to produce property, either general or particular, it muſt be the occupancy of a thing, which at the time of ſeizing it had no owner. But if the land, which is in diſpute, has been cultivated, or otherwiſe uſed excluſively, from time immemorial by the members of one of the nations without any interruption at all, or without any but what has been withdrawn as wrongful; this is an evidence, either that this land was included in the occupancy, which the nation made at its firſt ſettlement, and ſo was a part of its original territory, or elſe that it was acquired afterwards by mutual agreement. A claim likewiſe may have been kept up, without any cultivation or uſe of the land, by including it from time to time, when the nation has made perambulations to aſcertain the boundaries of its territories, or by ſetting up ſtanding land-marks, or by notice to all perſons, who have come thither for the purpoſe of ſetling upon it, to withdraw. But if the land has not been cultivated, or otherwiſe uſed excluſively, and no claim has been kept up by theſe means or by others of the ſame ſort; it is a part of the common ſtock of all mankind: ſo that either of the contending nations may appro-

priate it by occupancy; and the nation, which ſeizes it firſt, will have a right of territory in it.

[1] If a river at the confines of the territories of two nations changes its courſe, and any queſtion ariſes between the nations, whether a change is made in the extent of their reſpective territories, ſo that their juriſdiction extends to the river, as it did before; this is to be determined in the ſame manner and upon the ſame principles, as if a river at the confines of the two eſtates of two individuals, who are in a ſtate of nature, had changed its courſe, and a like controverſy had ariſen between theſe two private owners.

The principles, upon which Grotius argues in this queſtion, are founded in the different ſorts of limits, that are made uſe of to divide and ſet out lands. A parcel of land may be ſet out either by meaſure, or by ſuch limits, as are apparent to ſenſe: and theſe limits, which are apparent to ſenſe, may either be artificial or natural. In the ſuburbs of the cities of the levites we have an inſtance of poſſeſſions, which were limited by meaſure. Moſes commanded, that theſe ſuburbs ſhould reach from the wall of the city a thouſand cubits round about. The lands of private perſons are ſometimes diſtinguiſhed by artificial limits, ſuch as walls, or rails, or ditches, or hedges. Territories are likewiſe diſtinguiſhed by limits of the ſame ſort, ſuch as pillars, or mounds of earth. And either private eſtates or territories may be ſet out by natural limits, ſuch as mountains, brooks, or rivers. If theſe are the only ways, by which the lands of different owners can be bounded and ſeparated; it is not worth the while to enquire with ſome of the commentators upon Grotius, whe-

[1] Grot. L. II. C. III. § XVI. XVII.

ther he has explaned and applyed the ſeveral technical terms made uſe of by thoſe, who have profeſſedly written about the boundaries of lands, in the ſame manner and in the ſame preciſe ſenſe, in which theſe writers explane and apply them.

If lands, whether they are in the general property of nations, or in the particular property of individuals, are ſet out by meaſure; no change is made in the boundaries either of two private eſtates or of two territories, though a river, which runs at the confines of them, ſhould happen to change its courſe. Each party has a right to a certain quantity of land eſtimated by meaſure: and this meaſure is the proper limit of each partys claim. The river is not the limit; it only happened, that this river ran at the limit, or where the reſpective meaſures ended. And certainly no change can be made in the extent either of private property or of territory by a change in what was not the limit of them.

In like manner if the lands were ſet out and diſtinguiſhed from one another by ſome artificial mark; though a river, which once waſhed this mark, ſhould change its courſe, and run within it on one ſide, ſuch a change does not enlarge the extent of private property or of territory on one ſide, or diminiſh it on the other: becauſe the extent of ſuch private property or of ſuch territory cannot be changed upon account of a change, which is made in ſomething, that was not deſigned to be the boundary of them: and here the artificial landmark, and not the river, was deſigned to be the boundary: it was merely accidental, that the river ever ran cloſe to the landmark.

But in lands, which have no other limit, beſides a river, and were deſigned to have no other, Grotius diſtinguiſhes between a change made in the courſe of this river by imperceptible degrees and a change made all at once. Whilſt a change is making by imperceptible degrees, the river at any one inſtant of time is the ſame, as to ſenſe, that it was in the next preceding or will be in the next ſubſequent inſtant. In like manner it will be conſidered all along as the ſame river, and conſequently as the proper limit between the lands, that are on each ſide of it. But as long as the river is the ſame, the private property or the territories of the two parties on each ſide of it will extend as far as the river, and no farther; though by this imperceptible change the extent is enlarged on the one ſide and diminiſhed on the other. The change may at laſt become perceptible: but ſuch a change does not make the river different; becauſe it has all along been conſidered as the ſame. Whereas if the river leaves its old channel all at once, and breaks out in a new one; ſuch a change is perceived immediately; and the river is no longer reckoned the ſame, that it was before. For a river is not merely a ſtream of water coming from a ſpring, but ſuch a ſtream running in a channel. The ſameneſs therefore of the river cannot be preſerved, in the account of mankind, unleſs all the parts of this definition continue the ſame as to ſenſe; that is, unleſs the channel, as well as the ſpring, continues the ſame. And however the old river might be the limit of property or of juriſdiction on each ſide; the new river is not the limit; unleſs the parties, who claim property or juriſdiction on each ſide, agree to make it ſo. In the mean time their claims will extend juſt as far as they did

did before this change; that is, to the old bed of the river.

In applying theſe principles it will be neceſſary to know, whether the lands in queſtion have any other boundary, or whether they were originally deſigned to be ſet out by the river; when the river changes its courſe by imperceptible degrees. For in this caſe, the extent of private ownerſhip or of territory will be changed; if the river was the proper boundary of the lands. Whereas if they were ſet out by meaſure or by artificial marks, ſuch a change in the courſe of the river makes no change in the extent of private ownerſhip or of territory. The general rule here is, that if no evidence can be found of any other limit, we may reaſonably preſume, that the river was intended to be the limit: becauſe it is moſt likely, where nothing appears to the contrary, that either individuals or nations would chuſe to have ſuch a limit of their eſtates or of their territories, as will be a natural fence to them and may be had without any trouble.

No right of territory in things, that do not admit of property.

VIII. After [m] Grotius had ſpoken of occupancy as the means of acquiring either juriſdiction or property; he goes on to divide juriſdiction into two ſorts, a juriſdiction over perſons and a juriſdiction over things. But his readers ſhould obſerve, that occupancy is not the origin of both ſorts of juriſdiction. No act of occupancy will produce a juriſdiction over perſons: this can be produced no otherwiſe than [n] by generation, or by conſent, or by a crime. The only juriſdiction therefore, that is acquired by occupancy, is over things. And though Grotius has here occaſionally mentioned both ſorts of juriſdiction, we have no reaſon to ſup-

[m] L. II. C. III. § IV. [n] See B. I. C. X. § III. C. XI. § I.

poſe, that he conſidered occupancy as the means of acquiring both; not only becauſe he elſewhere teaches us, that a right over perſons is to be acquired by other means; but becauſe, when he here ſpeaks of occupancy as the origin not only of property but likewiſe of juriſdiction, he ſeems to confine the juriſdiction, which ariſes from thence, to things only, by ſaying, that occupancy produces juriſdiction over ſuch things, as are not yet appropriated.

But be this as it will; if occupancy is the origin of juriſdiction over things; the conſequence will be, that no juriſdiction can be acquired over ſuch things, as are not capable of being appropriated. For the reaſon, why ſome things do not in the nature of them admit of property, is, becauſe they do not admit of occupancy: and where no occupancy can be made, no juriſdiction can be acquired. Thus rivers, or bays, or ſtraits, which are capable of being appropriated by individuals, may likewiſe be part of the territories of a nation. But as no individual can acquire property in the main ocean, either in whole or in part, ſo the ocean cannot be within the juriſdiction, or belong to the territory of any nation.

Whilſt °Grotius conſiders occupancy as the origin of juriſdiction, it is remarkable to find him contending, that though the main ocean cannot in whole or in part be the property either of an individual or of a nation, yet it will admit of juriſdiction. His diſtinction between property and juriſdiction, if there was any real foundation for it, would not clear up this matter. For whatever difference there may be between them, they have the ſame origin. And if the nature of the ocean excludes property, becauſe it will not admit of occu-

° L. II. C. III. § III. C. II. § III.

pancy;

pancy; it will for the ſame reaſon exclude juriſdiction. But in fact there is no other real difference between property and juriſdiction, than that the former is either private ownerſhip, which is veſted in an individual, or the full ownerſhip, which a nation acquires by occupancy in the groſs, and the latter is the paramount property, which continues to be veſted in a nation, after private ownerſhip is granted to its ſeveral members. In common language property in things ſignifies the private ownerſhip of them; whilſt the paramount property in them is expreſſed by the peculiar name of juriſdiction. But this is only a difference of words: both ownerſhip and juriſdiction have the nature of property; for both of them conſiſt in an excluſive right over things in ſome reſpect or other. [p] Grotius, in ſupport of a diſtinction between property and juriſdiction, alledges, that the property of land may paſs to an alien, who lives in a foreign country, but in the mean time the ſociety, in the territories of which the land is, will retain its juriſdiction: and they muſt needs be different rights, which can thus be ſeparated from one another. I ſhall not call the poſſibility of the fact, which is here ſuppoſed, into queſtion: becauſe though an alien is [q] naturally incapable of inheriting land, he may be made capable by civil laws. I likewiſe allow, that in the caſe, which is here ſuppoſed, the property of the land would paſs to the alien, and the juriſdiction would remain where it was before. From hence it will certainly follow, that juriſdiction is not the ſame right with what in common language is called property. But it will be no conſequence, that juriſdiction is not any ſort of property. I do not ſup-

[p] L. II. C. III. § IV. [q] See B. I. C. VI. § VI.

poſe it to be the ſame ſort of property with private ownerſhip: if it is paramount property, it is ſuch a right, as can only be acquired by occupancy either mediately or immediately, and as thoſe things, which in their own nature are incapable of being appropriated by occupancy, cannot admit of.

We may go one ſtep farther. Whatever does not admit of full property or abſolute ownerſhip, cannot be a part of the territory or under the juriſdiction of a nation: becauſe all juriſdiction or right of territory preſuppoſes full property or abſolute ownerſhip. The firſt acquiſition, that a nation makes, when it ſettles upon any tract of land, which was before in common to all mankind, is the ownerſhip of the land. [r] Its juriſdiction, as far as it can be diſtinguiſhed from ownerſhip, is the paramount property in the land, or a right to direct the uſe and diſpoſal of it for the general benefit and ſecurity of the nation, after the ownerſhip has been granted by the public body to the ſeveral members. But this is not all. Whatever diſtinction there may be within a nation between juriſdiction and ownerſhip; there is no ſuch diſtinction in reſpect of other nations. The juriſdiction of a civil ſociety over its own territories is, in reſpect of its members, a paramount property to direct the uſe and diſpoſal of ſuch things, as are parts of the territory, to the purpoſes of ſocial union. But in reſpect of other civil ſocieties, juriſdiction or right of territory is a right of abſolute ownerſhip, or a full right to exclude them from having any thing at all to do with the territory.

There is another way, in which a nation may acquire juriſdiction or a right of territory, without ac-

[r] Grot. L. I. C. I. § VI.

quiring

quiring the abſolute ownerſhip of the land in the firſt inſtance by occupancy in the groſs. But this way like the other preſuppoſes abſolute ownerſhip to have been acquired, though not by the nation as one body, yet by the ſeveral members of it, as independent individuals, before the right of territory could take place. If a number of individuals, whoſe lands are contiguous to one another, unite themſelves into a civil ſociety; this act of union in the firſt inſtance gives the ſociety only a juriſdiction over their perſons. But a paramount property or juriſdiction over their lands, is a neceſſary effect of this juriſdiction over their perſons: becauſe the public by the act of ſocial union acquires a right to direct them, as in other particulars, ſo likewiſe in the uſe and diſpoſal of their land, in ſuch a manner and by ſuch rules, as the general welfare and ſecurity ſhall make neceſſary. The territories of nations were probably ſmall at firſt, and encreaſed by degrees, till they arrived at the ſize, of which we now find them. And in what way ſoever any nation made its firſt acquiſition, the extent of its territories has undoubtedly in many inſtances been encreaſed, not only by ſeizing upon other land, which was near to the place of its firſt ſettlement and had no owners, but likewiſe, where the land had owners, by incorporating thoſe owners into its body. But as far as the right, which the owners had in their lands, fell ſhort of full or abſolute property, ſo far the nation, which acquires juriſdiction over their perſons by their civil union with it, would fall ſhort of acquiring a full right of territory, or full juriſdiction, over their lands. When any civil ſociety has received an alien as a member by incorporating him into its body; the ſociety, which by thus receiving

receiving him acquires juriſdiction over his perſon, will not acquire juriſdiction over any lands, which belong to him in the territory of his native country. And the reaſon, why one of theſe juriſdictions does not here follow the other, is, becauſe his property in the land was not full and abſolute: his native country had a right of territory or a paramount property in it, by which his ownerſhip was limited. [s] Grotius might perhaps have a view to this method of acquiring juriſdiction over land, in conſequence of a juriſdiction acquired over the perſon of the owner, when he ſpeaks of perſons as the primary objects of juriſdiction, and of a territory as the ſecondary object of it. In the other method of acquiring juriſdiction over land, where a nation, after it is formed, ſettles upon a void tract of country, and by this act of ſettling upon it, which is an act of occupancy, acquires a right of territory or juriſdiction over it; the perſons, of which the nation conſiſts, may be called the firſt objects, and the territory may be called the ſecond object of juriſdiction; becauſe they ſucceeded to one another in this order of time. But ſince the juriſdiction over the territory does not in this caſe ariſe conſequentially out of the juriſdiction over the perſons, without the intervention of any other act; one of them cannot properly be called a primary and the other a ſecondary juriſdiction. But whatever might here be our authors meaning; it is evident, that where a juriſdiction over things ariſes conſequentially out of a juriſdiction over perſons, the things, over which ſuch juriſdiction is acquired, muſt at the time of acquiring it be the property of thoſe perſons. And from hence it follows, that ſuch things, as are in their own nature incapable

[s] L. II. C. III. § XIII.

of

of being appropriated, cannot in this way be brought under the juriſdiction of a nation, or become a part of its territory.

[t] Grotius does not extend the juriſdiction, which he ſuppoſes, that a nation may poſſibly have over the ocean, to the whole ocean, but only to ſome parts of it. This partial juriſdiction he explanes to be a juriſdiction either in reſpect of perſons, when a nation has a fleet, which is a maritime army, ſtationed in any part of the ocean, or in reſpect of territory, as far as a nation can from the ſhore command and reſtrain thoſe, who are upon that part of the ocean, which is next to the ſhore, as effectually, as if they were upon the land.

There can be no doubt about the juriſdiction of a nation over the perſons, which compoſe its fleet, when they are out at ſea; whether they are ſailing upon it, or are ſtationed in any particular part of it. But when they are thus ſtationed; this juriſdiction of the nation is merely a juriſdiction over their perſons, and not over that part of the ocean, where thoſe perſons are. We may ſay, if we pleaſe, that the nation has juriſdiction in that part of the ocean; becauſe the perſons, over whom it has juriſdiction, are there. But we cannot ſay with any ſort of propriety, that it has juriſdiction over the ocean itſelf: becauſe as the perſons, who are under its juriſdiction, have no property in the ocean merely by being upon it; the juriſdiction of the nation over the perſons, who are there, will give it no juriſdiction over the ocean. If a land-army was paſſing through an uninhabited country, the nation, to which the army belongs, would have juriſ-

[t] Ibid.

diction

diction in that country: becauſe the perſons, who are the objects of its juriſdiction, are in that place. But in the mean time, if the army acquired no property in the country, the nation would have no juriſdiction over the land, where the army happens to be; that is, the land itſelf, merely by the armys being there, would not become the object of the nations juriſdiction. And a fleet, by being in any part of the ocean, where the perſons who compoſe it, cannot acquire property, will no more make that part of the ocean the object of a nations juriſdiction, than an uninhabited country is made the object of its juriſdiction by the paſſage of a land-army through the country without acquiring any property there. An armed fleet, when it lies in any part of the ocean, may certainly repel any armed force, that attacks it; not becauſe this part of the ocean is under the juriſdiction of the fleet, or of the nation, to which the fleet belongs; but becauſe it it under no juriſdiction at all. A fleet of fiſhermen have likewiſe a right, when they are fiſhing in any part of the ocean, to drive all others from thence, that ſhall come to fiſh upon the ſame ſpot, where their nets are. But this right does not ariſe from any juriſdiction over the ocean, but from the community of it. The place is common to all mankind to be uſed by all, as they have occaſion; and thoſe, who have firſt ſeized it to uſe it, have a right to uſe it firſt. This right indeed ariſes from ſeizure or occupancy: but we muſt diſtinguiſh between the occupancy of a common thing to uſe it, and ſuch occupancy, as ſeparates the thing from the common ſtock, and gives the occupant property in it.

A

A nation has juriſdiction, in reſpect of territory, over ſo much of the ocean, as is included within the land: ſo that all ſhips, and all perſons, who are in them, are under the juriſdiction of the nation, if they are in any of its ports, or in any bays, or other arms of the ſea, which are appendages to the land. This juriſdiction extends itſelf likewiſe into the main ocean, as far as the low-water mark: for the ſhore itſelf, though this part of it is ſometimes covered with water, reaches thus far. But all beyond this is out of the juriſdiction: the nation can have no right of territory in it; becauſe, as it is in its own nature an uncertain and indeterminate thing, it will not admit of ſuch occupancy as produces property; and thoſe things, which are incapable of being appropriated, do not admit of juriſdiction.

It is commonly ſaid, that a more extenſive juriſdiction will be of uſe to nations, which border on the ſea; that the ſea is their bulwark; that in order to ſecure themſelves againſt being attacked on this ſide, it is neceſſary for them to be lords of the ſea, as far as they can extend their force from the ſhore by means of great guns, or other inſtruments of the like ſort; and that it is reaſonable the territory ſhould extend ſo far, becauſe all armed ſhips, which come within that diſtance, are able to do them miſchief and are indeed within their bulwark. What is thus urged might have ſome weight; if foreigners, who come with armed ſhips and are likely to do miſchief to a nation, could be proceeded againſt only by the civil laws of the country. For its civil law takes place only within its territory: and conſequently if as much of the ocean, as is here claimed, was not within the territory, an armed

armed force muſt be near enough to do miſchief from the ſea, or if the territory reaches only to the low-water mark, it muſt even be landed; before the nation would have a right to repel it. But this is not the caſe: two nations in reſpect of one another are in a ſtate of equality: and any danger, which one of them apprehends from the other, is to be guarded againſt or repelled, not by ſuch means as the civil law will furniſh, but by ſuch as the law of nature applyed to the collective perſons of civil ſocieties will allow of. Now in a ſtate of equality, where there is reaſon to believe, that an injury is intended, the law of nature will allow us to demand ſecurity, that we ſhall not ſuffer it, of thoſe, who are otherwiſe likely to commit it; though the injury is a diſtant one: and where ſuch ſecurity is refuſed, the ſame law will allow us to make uſe of force for obtaining it. Thus the law of nations will render the ſea as effectual a bulwark to a nation, which is waſhed by it on one ſide, or encompaſſed by it on all ſides, though the territory of the nation ends at the ſhore; as the civil law would, if the territory extended from the ſhore to the utmoſt random of a great gun.

[u] If one nation has obliged itſelf to another, by particular compact, not to go into ſome particular part of the ocean with an armed ſhip, or not to come thither either for the purpoſe of fiſhing, or for ſuch other purpoſes, as are ſpecified in the compact; the latter of theſe nations will have a right to hinder the former from doing what it has thus obliged itſelf not to do. But this right does not ariſe from any property in this particular part of the ocean, or from any juriſdiction over

[u] Grot. L. II. C. III. § XV.

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it, but from the good faith of compact. The effect of this compact may eaſily be diſtinguiſhed from property or juriſdiction. Property or juriſdiction is a right of excluding all nations from the uſe of a thing: whereas this compact produces ſuch a right only againſt the ſingle nation, which has made itſelf a party to it: this nation is not at liberty to go into that part of the ocean, into which it has bound itſelf not to come; but all other nations, that are not parties to the compact, are as much at liberty to go thither, as if no ſuch compact had been made. It is poſſible, that a nation may, in much the ſame manner, acquire a ſort of excluſive right of fiſhing in ſuch parts of the ocean, as are near to its own coaſts. For as one nation might bind itſelf by compact not to come thither for this purpoſe; ſo all nations, that are likely to come thither, might bind themſelves in the ſame manner. A tacit compact might likewiſe produce a right of the ſame ſort: thoſe maritime nations, that are in the neighbourhood, may tacitly have conſented to eſtabliſh this right by ſubmitting from time to time to be excluded from fiſhing near to the coaſts of the nation, which acquires the right. But this conſent does not give the nation, whoſe coaſts they are, either property or juriſdiction in thoſe parts of the ocean, which are near to its coaſts. This uſage binds only thoſe, who have made themſelves parties to it by ſuch ſubmiſſion or acquieſcence: it does not bind remote nations; nor does it bind even neighbouring nations, that are lately become maritime ones: becauſe as neither of them have ever acquieſced in the uſage, or ſubmitted to be excluded from fiſhing in theſe particular places, they have

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have never made themſelves parties to the compact of excluſion.

Different ſorts of war.

IX. We have [v] already explaned the general notion of war, and have conſidered the nature of private war in particular. This is the only ſort of war, that could happen in the liberty of nature. For though ſuch a number of independent individuals might occaſionally join together in the uſe of force, as would make an army equal to thoſe, which nations commonly bring into the field; yet a war, which is carried on with an army of this ſort, would not be a public one. Public war is diſtinguiſhed from private, not by the number of forces or the greatneſs of the army, that is employed, but by the character of the perſons, who are the contending parties in it. A war of private perſons or individuals will be a private war, whatever the numbers may be that engage in it, and take part with one ſide or the other. [w] Public war is the war of public perſons; that is, of civil ſocieties: and conſequently there can be no ſuch war, where there is no civil union. But civil ſocieties act, in their intercourſe with one another, by their reſpective ſupreme executive bodies; whether it is the friendly intercourſe of leagues and conventions, or the hoſtile intercourſe of war. A war therefore will be a public one, though it is no otherwiſe the act of thoſe civil ſocieties, that are the contending parties in it, than as it is the act of their reſpective executive bodies.

All magiſtrates indeed are public perſons: and from hence a queſtion may ariſe; whether every war, which begins from any magiſtrate whatſoever, is public war, or whether this name is confined to thoſe wars only,

[v] See B. I. C. XIX § I. II.

[w] Grot. L. I. C. III. § I.

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that begin from ſupreme magiſtrates? [x] Grotius treats this as a queſtion about words, the uſe of which is arbitrary: we are at liberty to give the words—public war—either of theſe ſenſes; provided we explane beforehand the ſenſe, in which we uſe them, and take care to uſe them ſteadily in this ſenſe. But this anſwer will ſcarce ſatisfy the enquiry. For they, who make it, do not want to be informed, what ſenſe they are at liberty to give theſe words; but in what ſenſe they muſt uſe them in order to ſpeak the language of the law of nations.

To clear up this matter, we may obſerve firſt; that ſince a magiſtrate in any civil ſociety is no otherwiſe a public perſon, than as he is authorized to act for the ſociety; no act, that he does without being authorized by the ſociety to do it, is done by him as a public perſon, or can be called a public act. A war therefore, though it begins from a perſon, who is a magiſtrate, will not be a public war, unleſs it begins from him as a magiſtrate; that is, unleſs he is authorized by the ſociety to make war.

Secondly; in a civil ſociety there are commonly two ſorts of inferiour [y] magiſtrates inveſted with executive power: one ſort is inveſted with the internal, and the other with the external branch of it: ſome magiſtrates are commiſſioned by the ſociety to act with the public civil force to put the laws in execution at home; whilſt others are commiſſioned to act with the public military force to defend and maintain the rights of the ſociety againſt its enemies from abroad. The civil law conſiders the former ſort of magiſtrates as public per-

[x] L. I. C. III. § IV. [y] See B. II. C. III. § XI.

ſons: but in the view of the the law of nations, as they have no concern with other nations, they have no public character, or are not public perſons. A war therefore, which begins only upon the authority of ſuch magiſtrates as theſe, is not a public war in the language of the law of nations.

Thirdly; amongſt thoſe magiſtrates, who are appointed to act in the external branch of the executive power; ſome have only a ſubordinate authority: and as theſe do not act for the nation at their own diſcretion, but are under the direction of the ſupreme executive body, their character in reſpect of other nations is not a public one. A war therefore, which proceeds only from their authority, cannot be called a public one by the law of nations.

Upon the whole; whatever liberty we have to uſe words in what ſenſe we pleaſe; the law of nations will call no war a public one, unleſs it proceeds on both parts from thoſe, who are inveſted with ſupreme executive power in the external branch of this power: for in the view of this law no other magiſtrates have a public character in reſpect of war.

[z] Grotius extends the notion of public war to all war, which begins from any magiſtrate whatſoever: and to juſtify this extenſive ſenſe of the words, he maintains, that even inferiour magiſtrates, ſince they are appointed for the defence and ſecurity of the people in their ſeveral diſtricts, muſt in conſequence of their appointment have a right to make war, when the defence and ſecurity of that part of the people which is committed to their truſt, requires it; unleſs they are laid under ſome poſitive reſtraint by civil law

z L. I. C. III. § IV. V.

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He allows however, that in fact moſt or rather all civil ſocieties have taken care by ſome poſitive proviſion to lay their inferiour magiſtrates under ſuch a reſtraint: becauſe, as the ſafety of the whole ſociety is hazarded in war, it was proper to confine the right of making war to the ſupreme executive body, which has the care of the whole. But the contrary opinion is more conſiſtent with the nature and effects of ſocial union. The appointment of an inferiour magiſtrate does not leave him at liberty to make war, till ſome poſitive civil law reſtrains him: on the contrary ſuch magiſtrates can have no right of making war, unleſs this right has been given them by ſome poſitive civil law. In conſequence of ſocial union the exerciſe and direction of the common force belongs to the collective body of the ſociety, and not to any particular part of this body: nothing but a poſitive appointment made by this body itſelf in ſettling the conſtitution, or by the legiſlative body, which, after the conſtitution is ſettled, acts for the collective body, can naturally authorize any particular part of the ſociety, or any particular perſon in it, that is, any executive body or any magiſtrate, to exerciſe and direct the common force. A magiſtrate, who is appointed to act in the internal or civil branch of the executive power, can only uſe this force at home, and is reſtrained by the nature of his office from uſing it any otherwiſe even at home, than under the direction of the civil law. Such a magiſtrate therefore has no more right to make external war, than a private perſon. And the uſe, which he is authorized to make of the public force at home, to put the laws in execution, if it can be called public war at all, is only public war by the civil law, and not by the law of

nations. In the external branch of executive power the notion of an inferiour magiſtrate or ſubordinate commander implys, that the ſociety has appointed him to act, not at his own diſcretion, but under the direction of the ſupreme executive body. The nature therefore of his appointment, though he is a magiſtrate, gives him no right to begin an external war.

But though all magiſtrates of one ſort, and all inferiour magiſtrates of the other ſort, are reſtrained by the nature of ſocial union and the terms of their reſpective appointments from making war; it may be aſked, whether there are no caſes, in which this reſtraint is taken off, and conſequently in which a war, that is made upon the authority of any magiſtrate whatſoever, will be a public one? Grotius mentions two caſes, which he ſuppoſes to be of this ſort: firſt, when the ordinary officers of a magiſtrate are ſufficient to reſtrain a few diſobedient ſubjects without hazarding the ſafety of the whole ſociety; or ſecondly, when ſome immediate danger ariſes, which will not allow him to have recourſe to the ſupreme magiſtrate for his authority. In the firſt of theſe caſes our author proceeds upon the principles, with which he ſet out; that all magiſtrates are naturally at liberty to make war, if they are not reſtrained by ſome poſitive law; and that the deſign of ſuch poſitive law is to prevent the ſafety of the whole ſociety from being hazarded by a perſon who is only entruſted with the care of a part: from whence he concludes, that where, without hazarding the ſafety of the whole, any inferiour magiſtrates by the help of their ordinary attendants can repreſs a few rebellious ſubjects, the obligation of theſe reſtraining laws ceaſes, becauſe the reaſon of them ceaſes. W

muſt certainly allow, that, where a magiſtrate has any ordinary attendants aſſigned to him by the public, for the purpoſe of uſing the common force, he has authority to employ them for this purpoſe. But this authority extends no farther, than the nature and end of his appointment extends: if in any inſtance he uſes even the force, with which he is entruſted, in any other manner, or for any other purpoſe, than is warranted by his appointment; this, as it is his own act, and not the act of the public, cannot be called public war. The reſtraint, that he is under, does not ariſe from any poſitive act of the law, but from a negative act of it: he has no right to uſe the force, that is in his hands, at his own diſcretion; not becauſe any poſitive law has reſtrained him from doing any thing, which as a magiſtrate he might otherwiſe have done; but becauſe as a member of the ſociety he has no right to uſe the public force at all without the concurrence of the ſociety: and conſequently, though he is appointed to be a magiſtrate, he has no right to uſe it any farther, than the law has empowered him. It is neither the equitable conſideration, that he, who is entruſted only with the care of a part, ought not to hazard the ſafety of the whole, nor any poſitive law made upon this equitable conſideration, that reſtrains an inferiour magiſtrate from making war at his own diſcretion. The reſtraint ariſes at firſt from ſocial union, and continues even after he is appointed to be a magiſtrate, as far as the law has not taken it off by the expreſs terms of his commiſſion, or by the nature of the magiſtracy, to which he is appointed. And if the law has not thus given him a diſcretionary power, however poſſible or however likely it might be, that the force, which he

could exert by his ordinary attendants, would repel or ſtop an inſurrection; yet he is not at liberty to exert this force, as a magiſtrate, any otherwiſe than the law has commiſſioned him: becauſe beyond his commiſſion he has no more right, than a private perſon, to judge about this poſſibility or this likelihood and to act upon ſuch judgment. In the ſecond caſe we agree with our author, that an inferiour magiſtrate may uſe what force he has at hand, to repel ſuch an immediate danger, as will not allow him time to have recourſe to the ſupreme executive body. But this act of force is no more a public war upon account of his being a magiſtrate, than it would have been, if the ſame private perſons, who act with him, had acted without him. The force, which he exerts for this purpoſe, if in exerting it he exceeds the commiſſion, under which he acts as a magiſtrate, is only private force. It is not his authority, but a failure of juriſdiction, upon account of the exigency of the caſe, that makes the force lawful.

After what has been ſaid, it will be needleſs to enquire, whether an inferiour magiſtrate, where he is not preſſed by any ſuch exigency, may make war, as he ſees opportunity, upon a conjecture, that the ſupreme executive body would authorize him, if he was to conſult it. For an inferiour magiſtrate has no right to act with force beyond his commiſſion. If therefore the nature of his office and the terms of his appointment have given him no diſcretionary power; he has no right to act upon any conjecture, which he makes, about what he might probably be authorized to do, if he was to conſult the ſupreme executive body.

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All wars of a nation againſt its external enemies are not public wars. To make a war a public one, both the contending parties muſt be public perſons; that is, it muſt be a war of one nation againſt another; and conſequently it muſt begin and be carried on by the authority of the ſupreme executive body on both ſides. Where a nation makes war upon pirates or other robbers, though theſe are external enemies, the war will be a mixed one: it is public on one ſide; becauſe a nation or public perſon is one of the parties: but it is private on the other ſide; becauſe the parties on this ſide are private perſons, who act together occaſionally and are not united into a civil ſociety. A band of robbers or a company of pirates may in fact be united to one another by compact; and may have ſtipulated with one another in this compact to be directed by the common underſtanding and to act by the common force for their general benefit. But they are ſtill by the law of nature only a number of unconnected individuals; and conſequently in the view of the law of nations they are not conſidered as one collective body or public perſon. For the compact, by which they unite themſelves, is void: becauſe the matter of it is unlawful. The individuals, that form themſelves into a civil ſociety, are bound by their ſocial compact to purſue and to maintain a common benefit: but this common benefit is ſuch an one, as is intended to be conſiſtent with the obligations, which they are naturally under to the reſt of mankind. Whereas the common benefit, which a band of robbers or a company of pirates propoſe to themſelves, conſiſts in doing harm to the reſt of the mankind.

When any of the members of a civil ſociety make uſe of force to oppoſe the execution of the laws, or to ſupport themſelves in the violation of them, and the magiſtrates, who are entruſted with the internal executive power, exert the civil force to repel or to repreſs them; this is a contention by force, and may therefore be called war; though in our common way of ſpeaking we do not uſually give it this name. On one ſide it is a riot, or a tumult, or a ſedition, or an unlawful reſiſtance. But I do not know, that in our language there is any particular name for it on the other ſide. According to our authors notion of public war; this uſe of force on the ſide of the magiſtrate would be a public war, and the whole act of contention, if we take in both parts, would be a mixed war. But in the language of the law of nations it is certainly neither public nor mixed. For this law relates only to the intercourſe of a nation with the reſt of mankind, and takes no notice of what paſſes within a nation, either between the ſeveral members of it, or between the body and any of the members. If the force, which is made uſe of for theſe unlawful purpoſes by the members of the ſociety, ſhould be ſo great, as to make it neceſſary for the civil magiſtrate to take the military force to his aſſiſtance; yet as long as this force is under the direction of ſuch a magiſtrate, the contention is ſtill what it was before: it has no name on the part of the ſociety, and is called a riot, or a tumult, or a ſedition, or an unlawful reſiſtance, on the part of the members.

When the ſeditious members are ſo ſtrong, that the executive body is obliged to interpoſe and to take the command and direction of the military force; this contention

tention is called a rebellion on the part of the ſubjects, and may be called a civil war on the part of the ſociety. A contention by force is a mixed act of the ſame ſort and may on each part be called by the ſame names, where the ſubjects endeavour by unjuſt force to overturn the government, and the executive body on behalf of the ſociety interpoſes with the military force to ſupport it.

In monarchies either abſolute or limited, where the matter in diſpute is the title to the crown, and this title has been left doubtful by the civil law, a contention by force is a civil war on both parts. But if the civil law has clearly determined the title, ſuch a contention by force is a rebellion on the part, that claims againſt the civil law, and a civil war only on the part that claims under it.

Where force is made uſe of by the members of a civil ſociety to reſiſt ſuch tyrannical oppreſſion of the governours, as is ſubverſive of the ends of ſocial union; a war of this ſort cannot properly be called rebellion; ſince this name imports a forcible oppoſition to lawful authority. And the preſumption, that civil governours will always diſcharge their duty, has prevented mankind from giving it any name, which implys injuſtice on the ſide of the governours. Such a war therefore goes under the general name of a civil war.

If any one ſhould aſk, whether theſe internal wars of a civil ſociety are public, or private, or mixed? we muſt certainly anſwer, that, in the language of the law of nations, they are neither. For ſince this law takes no notice of what paſſes within a civil ſociety, as far as what paſſes there has no reference to the reſt of man-

mankind; it has no occaſion to mention wars of this ſort, and therefore gives them no name: it does not ſo much as call them wars; and much leſs does it rank them under the heads of public, or private, or mixed. The reaſon, why ſome writers have thought, that theſe contentions by force within a ſociety are not to be called wars at all, may perhaps have been, that the law of nations does not call them ſo. But this reaſon is of no weight: for the law of nations does not call them wars; not becauſe they are not wars; but becauſe they are ſuch acts, as do not come within its view, and as it has therefore given no name to. They have certainly the nature of war; for they are contentions by force. Common uſage likewiſe has given them this name and calls them civil wars. And if, inſtead of attending to the preciſe language of the law of nations, we attend to the nature of the acts; we ſhall find, that civil wars may be either public, or mixed, or private. A civil war upon a doubtful title to the crown may be called a public one; becauſe the heads of each party are reſpectively conſidered by their own people as public perſons. Where the contention by force is a rebellion on the part of the people, and a civil war on the part of the government; this is a mixed war: one of the parties is under the conduct of a public perſon, and the other conſiſts of private perſons. And ſince the people cannot act upon a right of reſiſtance, but only ſo far as they are not in ſubjection and the governours have no juriſdiction; a civil war, which begins and is carried on upon this right, may be called a private one: becauſe, where there is no ſubjection on one ſide, and no juriſdiction on the other, the perſons concerned are in reſpect of one another private perſons.

X

X. Public war is divided into perfect and imperfect. The former ſort is more uſually called ſolemn according to the law of nations, and the latter unſolemn war. Grotius defines perfect or ſolemn war to be ſuch public war as is declared or proclamed. Indeed the very name of war is ſo far appropriated by common uſage to ſolemn war, that, when we ſpeak of war, we are generally ſuppoſed to mean this ſort; unleſs we add ſome term of diſtinction to ſhew, that we mean ſome other ſort, by calling it a private war, or a civil war, or a piratical war. Unſolemn or imperfect wars between nations, that is, ſuch wars as nations carry on againſt one another without declaring or proclaming them, though they are public wars, are ſeldom called wars at all: they are more uſually known by the name of reprizals or of acts of hoſtility.

Solemn war what, and why called juſt war.

Thus we find, that to make a war a ſolemn one, according to the law of nations, [a] two things are required: firſt it muſt be a public war; that is, the contending parties muſt be two nations acting reſpectively under the direction and by the authority of their ſupreme executive body: and ſecondly it muſt be proclamed, notified, or declared. The uſe of the common force of a nation by lawful authority to quell inſurrections, or to repreſs rebellions, though we find, that there is ſometimes a declaration of war, at leaſt on the ſide of the rebels, is not a ſolemn war according to the law of nations; becauſe this law does not conſider it as a public war: and reprizals, though they are contentions by force between two nations, and may therefore be called public wars, are not ſolemn wars; becauſe they are not preceded by any expreſs and open declaration of war.

[a] Grot. L. I. C. III. § IV.

Perhaps

Perhaps another definition of ſolemn war may be found, which will help us in explaning the natural effects of proclaming or declaring war. A ſolemn war is a war, which appears evidently to be a national act on both ſides, or to be the war of the whole collective body of one nation againſt the whole collective body of another. This definition includes all that is included in our authors definition. A war cannot be a national act on both ſides without being a public one: and it cannot appear evidently to be a national act without being proclamed or declared.

When a ſolemn war is called, as it ſometimes is called, a juſt war according to the law of nations; [b]Grotius imagines, that this appellation is intended to denote, not that the law of nature or of nations allows only this ſort of war, and forbids all other ſorts, but that this ſort produces, —*quoſdam* juris *effectus*,— certain effects by the law of nations, which no other ſort will produce. The effects, which he means, are impunity for what is done, and property in what is taken. We will enquire preſently how far theſe effects are peculiar to ſolemn war, and in the mean time will examine our authors opinion about the reaſon for giving the name of juſt wars to wars of this ſort. What he has advanced about the effects, which the law of nations allows to ſolemn wars, and about the reaſon for calling them juſt wars upon account of theſe effects, he explanes by the two inſtances of marriages and wills. When the roman law calls the matrimonial union of free perſons a juſt marriage; this appellation, he ſays, is not intended to denote, that the matrimonial union of ſlaves, though this has not the ſame appellation given

[b] Ibid.

to

to it, is unjuſt or forbidden, but only that the former produces ſome effects or ſome claims by this law, which the latter does not produce. In like manner when a will, as it is diſtinguiſhed from a codicil, is called a juſt will by the ſame law, we are not to underſtand from hence, that making a codicil is an unlawful act, but only that this law gives ſome effects to a will, which it does not give to a codicil.

But perhaps a juſt marriage and a juſt will might derive this appellation rather from their nature, than from their conſequences. Some matrimonial unions ſeem to have been called juſt marriages, not upon account of the effects of law, which they produced, but upon account of their legal perfection, that is, their exact conformity to the ſtricteſt or higheſt rules, which the law relating to ſuch unions had preſcribed: whilſt other matrimonial unions, though the law, as it had not forbidden them, allowed of their validity, were not called juſt marriages; becauſe they wanted this conformity to the higheſt rules of the law, and were therefore in the view of the law imperfect in their kind. In like manner one ſort of diſpoſition of a mans goods upon the event of his death ſeems to have been called a juſt will, whilſt another ſort was called a codicil without the appellation of juſt; becauſe the former was perfectly conformable to the ſtricteſt notion, that the law had of ſuch a diſpoſition, or was attended with all the qualities, that the law required; whilſt the latter, having no more requiſites of law, than were neceſſary to make it a valid act, fell ſhort of legal perfection.

The roman writers apply the word—juſt—to ſome wars, and diſtinguiſh them from other wars, to which they do not give the ſame appellation. But when the former

former are thus called juſt wars; this appellation is not deſigned to denote, that they produced any peculiar effects of law, but only that in the manner of beginning them, they were exactly conformable to the rules of their fecial law or law of arms. When they call this law the law of nations; we are not to underſtand from hence, that it was a poſitive law eſtabliſhed by the conſent of all nations. It was in itſelf only a civil law of their own: they called it a law of nations; becauſe the deſign of it was to direct them, how they ſhould behave towards other nations in the hoſtile intercourſe of war; and not becauſe all nations were obliged to obſerve it.

I do not deny, that ſuch acts, as are called juſt ones, upon account of their legal perfection or their exact conformity with law, produce effects, which other acts, that are leſs perfect in their kind, will not produce: I only deny, that theſe effects of the law are the reaſon, why the acts are called juſt ones. And in denying this I am ſupported by a very common uſe of the word—juſt. We frequently apply it both to actions and to things to denote, that they are perfect in their kind. In this ſenſe we ſpeak of a juſt battle, a juſt army, and a juſt volume, to diſtinguiſh them from a ſkirmiſh, a ſmall party, and a pamphlet. Since therefore actions are thus called juſt, to denote, that they have a general perfection in their kind; it is reaſonable to conclude, that, when they are called juſt in reference to any law, this appellation ſhould be underſtood to denote, that they have a legal perfection in their kind.

For theſe reaſons I am inclined to think, that a ſolemn war is called a juſt one according to the law of nations;

nations; becauſe in the view of this law it has ſome ſort of legal perfection. But this perfection cannot conſiſt in an internal conformity with the law: for if it did, as this law is only the law of nature applyed to the collective perſons of civil ſocieties, no wars could be called juſt, unleſs they were moved upon ſuch reaſons, as the law of nature will juſtify: whereas in the ſenſe, that we are now enquiring about, wars are called juſt, provided they are ſolemn, without any regard to their internal reaſons. The legal perfection therefore, upon account of which ſolemn wars are diſtinguiſhed from other wars by this appellation of juſt, is merely external. The reader may probably ſee by this time what this external perfection is. As nations are the only proper objects of the law of nations; no contention by force is properly called war in the language of this law, unleſs nations are the contending parties, that is, unleſs it is a public war. But amongſt the wars of nations, ſome are imperfectly public. If one nation ſeizes the goods of another nation by force, upon account of ſome damages, which the former has ſuffered from the latter; ſuch contentions by force are called reprizals. There may likewiſe be other acts of hoſtility between two nations, which do not properly come under the notion of reprizals, ſuch as the beſieging of each others towns, or the ſinking of each others fleets, whilſt the nations in other reſpects are at peace with one another. Theſe are public wars, becauſe nations are the contending parties. But as they are confined to ſome particular objects, they are of the imperfect ſort, and do not come up to the higheſt notion of a public war, which conſiſts in a war of the whole collective perſon of one nation againſt the whole collective perſon of another nation.

nation. The deſign of a declaration of war, by which the war becomes a ſolemn one, is to bring it up to this higheſt notion of public war, or to make it perfectly public: and it is this legal perfection, from whence ſuch wars have the appellation of juſt ones: by calling them juſt wars we only mean, that they are perfect ones according to the law of nations.

Juſtifying cauſes of war.

XI. The law of nations conſiders each civil ſociety as a moral perſon, and all the ſeveral ſocieties of the world as ſo many diſtinct perſons in a ſtate of natural equality. Since therefore an injury is by the law of nature the only juſtifiable cauſe of war amongſt individuals in a like ſtate of equality; nothing but an injury will juſtify a war amongſt civil ſocieties by the law of nations. But [c] as amongſt individuals, ſo likewiſe amongſt civil ſocieties, an injury will make the uſe of force juſt, either before or after it is done. Force may be made uſe of amongſt nations, to guard againſt an injury before it is done; to ſtop it, when it is beginning; to obtain ſecurity, that it ſhall not proceed; or to repel it, when it is near at hand. After an injury has been done, it produces both a right to recover reparation for the damages, that have ariſen from it, and a right likewiſe to inflict puniſhment in order to prevent the nation, which has done harm now, from doing the like again.

By the law of nature a future injury it not a juſt cauſe of private war, unleſs there is a plane deſign of doing it and no other way of preventing it from being done. And this law, when it is applyed to civil ſocieties, and ſo becomes a law of nations, makes no

[c] Grot. L. II. C. I. §II.

farther

farther allowance in favour of public war. [d] The growing power therefore of a nation, whilſt it abſtains from doing and from attempting to do injuries to its neighbours, is no juſtifyable cauſe for them to make war upon it, in order to ſtop the growth of its power, before it has acquired ſtrength enough to give it an opportunity of injuring them. For it is only the apparent deſign of doing an injury, and not the power of doing one, that makes defence by force lawful. In deliberations about war ſome regard may indeed be had to the probability, that a nation will grow too ſtrong for us, if we do not take care to reduce it in time. But this can only be regarded as a prudential cauſe and not as a juſtifyable cauſe of war. If other cauſes make a war juſt, this conſideration will make it adviſeable: but this conſideration alone is not ſufficient to juſtify a war, if no injury has yet been done or attempted.

The law of nations being the ſame amongſt civil ſocieties with the law of nature amongſt individuals; nothing but what is ſtrictly or properly an injury will juſtify a public war. From whence it follows, that where any nation makes war upon another only upon account of [e] ſome neglect or refuſal of what is matter of favour, or of courteſy, or even of humanity, ſuch a war is contrary to the law of nations. The falſe religion likewiſe of a nation can be no otherwiſe a juſt cauſe of making war upon it, than as this religion has actually produced ſome real and proper injury or ſome attempt to do ſuch an injury.

Not only ſuch injuries, as affect a nation immediately in its collective capacity, [f] but ſuch likewiſe, as are

[d] Grot. L. II. C. I. § XVII. C. XXII. § V.
[e] Grot. L. II. C. XXII. § XVI. [f] L. II. C. XXV. § I. II.

done to any of its members, are a juſtifyable cauſe of war. For theſe, by the law of nations, are parts of the collective perſon of a nation; and injuries, which are done to parts of this perſon, are done to the perſon itſelf. But when we ſpeak of an injury, which is done to one member or to a few members of a civil ſociety, as a juſtifyable cauſe of war; it is neceſſary to diſtinguiſh between what is a juſt cauſe of war in reſpect of the nation itſelf, to which theſe members belong, and what is a juſt cauſe of war in reſpect of the nation, that has done the injury. As a civil ſociety is obliged by the ſocial compact to guard the rights of its ſeveral members; ſo it is obliged likewiſe by the ſame compact to guard the common intereſt of the whole. Unleſs therefore the injury, which ſome of the members have ſuffered, affects, either in itſelf or in its conſequences, the whole ſociety, or ſuch a part, as bears a conſiderable proportion to the whole; however it might juſtify a war in reſpect of the nation, which has done the injury; it would ſcarce juſtify the governours of the nation, to which thoſe, who have ſuffered the injury belong, in reſpect of the duty, which they owe to their own ſociety, if they ſhould hazard the ſafety of the whole by a war, and ſacrifice the lives of many and the fortunes of moſt of their ſubjects to redreſs ſuch an injury. In the mean time the duty, which the ſociety owes to its injured members, is not ſuperſeded. Though the ſociety is not obliged to redreſs them by war when this method of redreſs is inconſiſtent with the general intereſt; yet it is ſtill obliged to ſecure their rights: and this obligation can be no otherwiſe diſcharged than by making them amends out of the public property for what they have loſt.

Among

Amongſt the other ways, in which an injury is a juſt cauſe of war, we have mentioned the right of inflicting puniſhment, where an injury has been committed. And as [g] individuals have this right in a ſtate of equality, the law of nations gives the ſame right to the collective perſons of civil ſocieties. Where an injury has been done, a nation, like an individual, has not only a right to a reparation of the damages, which it has ſuſtained, but it has likewiſe a right, where there was any malicious deſign of doing harm, to take ſuch meaſures with thoſe, who have done it, as may prevent them from doing the like again.

A nation may be accountable for the act of one of its members.

XII. The law of nations does not ſuppoſe that a civil ſociety muſt neceſſarily be a principal or an acceſſory in every act, which is done by any of its members. For this law, whilſt it conſiders the ſeveral members as parts of the collective body, does not ſuppoſe each member to have no will of his own, or to be incapable of acting for himſelf without the command or the conſent of that body. But though a nation is not neceſſarily an acceſſory to every injury, which is done by any of its members either to the general body or to the particular members of other nations; yet it may make itſelf an acceſſory either [h] by conniving at the injury, whilſt it is committed, and neglecting to prevent it, or by protecting thoſe, who have done the injury, againſt the juſt demands of thoſe, who have ſuffered it. By means therefore of ſuch connivence or ſuch protection a ſociety becomes accountable for the crimes or faults of its members.

Amongſt individuals the faults of ſervants may in many inſtances be charged upon their maſter; becauſe

[g] See B. I. C. XIX. § III. [h] L. II. C. XXI. § I. II. III.

they are under his authority, and it is his buſineſs to take care, that they do not miſbehave themſelves. And upon the ſame principles the neglect of a nation, in not preventing the ſubjects of it from offending, will make the nation a party in their offence: for the nation, ſince they are under its juriſdiction, is obliged to take care, that they do no harm to the reſt of mankind. But ſuch neglect does not make a nation acceſſory to the acts of ſubjects, that are in a ſtate of rebellion and have renounced their allegiance, or that are not within its territories: for in theſe circumſtances, the ſubjects, whatever they may be of right, are not under its juriſdiction in fact. The law of nature, as it reſpects civil ſocieties, and is called the law of nations, is ſomething different in this matter from the ſame law, as it reſpects individuals. Servants are commonly under the eye of their maſter, ſo that he has conſtant opportunities of knowing what they do: whereas ſubjects are not ſo immediately under the eye of the ſociety, that is, of the civil governours, who act for it; and conſequently many things, which are done by the ſubjects, may eſcape their knowledge. Now the general rule of law is, that no perſon, either individual or collective, can by means of any neglect, in not preventing the fault of another, be an acceſſory to the fault, unleſs he was obliged to prevent it, and knew likewiſe, that the fault was committed: for however he might upon other accounts be under a general obligation to prevent it; yet if he did not know of it, he could not in this particular inſtance be under any ſuch obligation; becauſe no perſons obligation extends beyond his knowledge. From hence it follows, that the ſame law of nature, which charges all the faults

faults of ſlaves upon their maſter, will only charge ſuch faults of ſubjects upon a nation, as were too frequent or too notorious to eſcape the knowledge of the public.

After an injury has been committed; a nation by protecting the offender againſt thoſe, who have a right to require reparation of damages or to inflict puniſhment, in order to defeat their right, makes itſelf a party in the injury. Connivence, or neglect to prevent an injury, cannot make a nation a party to the injury, unleſs the offender is one of its own ſubjects, or at leaſt was within its territories, when the injury was done: becauſe in any other circumſtances he is not under the nations juriſdiction. But by granting protection to an offender it may become a party not only in ſuch injuries, as are committed by its own proper ſubjects, or by foreigners, who by being reſident within its territories make themſelves temporary ſubjects, but in ſuch likewiſe, as are committed abroad either by its own ſubjects or by foreigners, who afterwards take refuge in its territories.

But the law of nations, by conſidering every civil ſociety as a diſtinct and entire body, which is united into one collective perſon by a ſocial compact, for the purpoſe of ſecuring and advancing its own welfare, allows every civil ſociety to have an excluſive juriſdiction over its own members: for it could not be a diſtinct and entire body, if its members were ſubject to any other juriſdiction, beſides its own. Now the notion of an excluſive juriſdiction veſted in each nation implys, that it has a right to judge for itſelf, how far its own members are to be puniſhed, and whether they are to be puniſhed at all or to be pardoned. From whence it ſeems to follow, that a

nation by not puniſhing one of its members, or by not ſuffering any one elſe to puniſh him, only exerciſes ſuch a juriſdiction as the law of nations allows. And the protection of a ſubject againſt puniſhment is, in this view of it, ſo far from making the nation a party in any injury, which he has committed, that it diſcharges the ſubject himſelf from all obligations, that aroſe from thence. But this difficulty, if it is one, ariſes merely from not attending to the nature of that excluſive juriſdiction, which the law of nations allows to every civil ſociety. For it is only a juriſdiction within the ſociety itſelf, that is, a juriſdiction where none but itſelf and its own members are concerned, and conſequently does not extend to ſuch offences, as we are now ſpeaking of, to offences, which are committed by the members of one ſociety either againſt the body or againſt the members of another. Neither the nature of ſocial union, nor the conſent of mankind to conſider civil ſocieties as diſtinct and entire collective perſons, will give any nation an excluſive juriſdiction, where the offences are of this kind.

There is another difficulty in this matter, which is of more importance. Every nation has an excluſive property in its own territories. [1] No perſons therefore, who are not members of it, can lawfully come thither without its leave. And whatever right of harmleſs profit they might pretend, yet if the nation apprehends, that it would be dangerous to itſelf to let them come thither, the law of nations does not oblige it to give them leave. If therefore any perſon is found within its territories, who has committed an offence againſt a foreign nation or againſt the members of a foreign

[1] Grot. ibid. § IV. V.

nation;

nation; what is to be done with him? The nation, in whoſe territories he is, cannot juſtly puniſh him, if what he has done, though it is a crime by the law of nature or of nations, is not forbidden by its own civil law. It would be dangerous to the nation to admit foreigners to come into its territories with an armed force to puniſh him: and conſequently, as they cannot come thither without leave, ſo in view to the ſafety or at leaſt to the peace of the ſociety, it would be wrong to give them leave. And yet, if the nation ſcreens him from puniſhment, it becomes a party in his crime, and gives thoſe, who are offended a juſt cauſe of making war upon it. What remains therefore for the nation to do, is what the injured nation has a right to demand: he ought to be delivered up to thoſe, againſt whom the crime is committed, that they may puniſh him within their own territories. This is the right. But how far a nation, that has been injured in itſelf or in its members, will chuſe either to inſiſt upon this right at firſt by demanding the criminal, or to ſupport it afterwards by force, if the demand ſhould not be complyed with, depends upon its own diſcretion. And if it is a general practice in europe, as Grotius affirms that it is, to waive this right, unleſs where the crimes are very heinous; the practice has been taken up upon principles either of political prudence or of tenderneſs towards the offenders: for whatever may have been eſtabliſhed amongſt particular nations by expreſs compacts, there is no general law, which obliges all nations in the world, or all nations in europe, to hold this conduct.

We may obſerve by the way, that when a nation thus delivers up one of its ſubjects, this is not inconſiſtent

ſiſtent with the ſocial rights of ſuch ſubject: for by the ſocial compact he acquires only a right to be protected againſt ſuffering cauſeleſs harm, and not a right to be protected in doing cauſeleſs harm

When a ſtate delivers up an offending member to pacify an enemy, and the enemy, either having ſome other cauſe of war, or being reſolved to make war at any rate, refuſes to receive him; [k] Grotius enquires, whether he continues a member of the ſtate after this act, or whether it deprives him of his right of citizenſhip? Cicero maintains, that the right of citizenſhip continues; becauſe ſuch a delivering up of a member is a ſort of donation, and can therefore produce no effect without acceptance. And undoubtedly, if we keep to the ſtrict notion of delivering up, there can be no ſuch act on one part, if there is no acceptance on the other part: for the ſtrict notion of delivery implys acceptance: where there is no acceptance, there may be an attempt or endeavour to deliver, but there can be no actual delivery. But the queſtion is, whether the act of the ſtate, though it cannot be ſtrictly and properly called delivery, is not of ſuch a ſort, as cuts off the right of citizenſhip? Grotius explanes this act to be nothing more than a permiſſion to the enemy to puniſh the offending member: and as the ſtate by ſuch permiſſion does not give any right to the enemy over the offending member, but only removes the impediment, which its own right of territory had laid in the way of puniſhment; it cannot by this act be underſtood to deprive its own member of any right: for where no right is given on one ſide, no right can be taken away on the other ſide. But this is an imper-

[k] Ibid.

fect

fect deſcription of the act of the ſtate: this act does not conſiſt merely in permitting the enemy to puniſh him, but in withdrawing protection. Scævola, as he is quoted by Grotius, explanes it in this manner, and from hence concludes, that the member loſes his right of citizenſhip, or ceaſes to be a member, whether the enemy accepts him or not: becauſe where protection is juſtly withdrawn, there can be no right of citizenſhip. We may however reply, that the ſtate withdraws its protection only for a certain purpoſe, and not abſolutely; for the purpoſe of putting it into the enemys power to puniſh the offending member, from whom protection is thus withdrawn. In all other reſpects his right to protection, which is the foundation of citizenſhip, continues. And if this purpoſe does not take place; as it does not, where the enemy refuſes to receive him; his right remains entire.

How far it would be [l] lawful for a ſtate to deliver up one of its members, who has committed no crime, in order to preſerve itſelf from being deſtroyed by a powerful enemy, depends upon the claims ariſing out of civil union and not upon the law of nations. For we are not to enquire here, whether one nation can juſtify itſelf in making ſuch a demand upon another? but whether the nation, upon which the demand is made, can lawfully comply with it?

In ſpeaking of the power of a ſociety over a whole province or any other conſiderable part of it, [m] Grotius determines, that it has no right to alienate ſuch parts without their conſent. For the right, which the ſociety has over them, depends upon the original compact, by which they united themſelves to it: and ſince the

[l] Grot. L. II. C. XXV. §III. [m] L. II. C. VI. § IV. V. VII.

terms

terms of this compact are, that they will pay allegiance to the ſociety in return for protection; they cannot be underſtood to have given the ſociety by this act a right to cut them off from it cauſeleſsly, and to put them under the juriſdiction of any other ſociety: becauſe if the ſociety has this right, the correſponding obligation of the parts muſt be, not only an obligation to be directed by the will of the ſociety in return for protection, but even to obey the ſociety, where their obedience would put them out of its protection. He determines in like manner, that a part cannot transfer its allegiance to another ſociety without the conſent of the ſociety, of which it is a part. Neceſſity however would juſtify the part in thus transferring its allegiance: becauſe the ſocial compact, like all other compacts, admits of the equitable exception of neceſſity.

But here Grotius adds, that the part has in this reſpect a fuller right than the whole. Neceſſity, by ſuperſeding the obligation of the ſocial compact, ſuperſedes all civil juriſdiction. The part therefore, in theſe circumſtances, is under no other obligation towards the whole, than it would have been in a ſtate of nature; where there is no ſuch relation of part and whole, of ſubject and ſociety, and conſequently no obligation of one towards the other. But if this is the effect of neceſſity, if it reduces things to the ſtate of nature, and ſo leaves no civil juriſdiction; the ſociety can have no extraordinary authority over any part of it, grounded upon the plea of neceſſity, to cut ſuch part off from the general body, and to place it under a new and foreign juriſdiction. Neceſſity, inſtead of giving the ſociety ſuch an extraordinary authority, puts an end even to its ordinary juriſdiction.

I agree with our author, that neceſſity does not give the ſociety ſuch an extraordinary authority. But he ſeems to be miſtaken in ſuppoſing, that neceſſity gives the part a fuller or more extenſive right in reſpect of the ſociety, than it gives the ſociety in reſpect of the part. For when a part of any ſociety transfers its allegiance, this act, as far as it relates to this particular ſociety, is only the withdrawing of allegiance. What follows this act, or what attends upon it, when the part, which ſo withdraws allegiance from one ſociety, puts itſelf under the juriſdiction of another, has no relation to the former ſociety. We do indeed call the whole act a transfer of allegiance: but what is done in ſuch a transfer relates to this ſociety no otherwiſe, than as allegiance is withdrawn from it. Whether the part puts itſelf under another juriſdiction, by joyning itſelf to ſome other nation, or whether it forms itſelf into a nation and ſets up a juriſdiction of its own, or whether the ſeveral individuals, that compoſe it, live independently afterwards in a ſtate of nature; the ſociety, to which the part belonged, is not concerned in any of theſe acts. If the part could of right withdraw its allegiance, any of theſe acts will be equally lawful. The queſtion therefore about the right of any part of a ſociety to transfer its allegiance to another ſociety, when it cannot otherwiſe be preſerved, amounts only to this, whether it has a right in ſuch circumſtances to withdraw its allegiance. And if neceſſity by ſuperſeding the juriſdiction of the ſociety will give it this right; the part and the whole are in the ſame condition, or have an equal right, in reſpect of one another. For as neceſſity ſuperſedes the obligation of the part to pay allegiance, ſo a like neceſſity will ſuperſede the obligation

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of the whole to give protection. Grotius therefore is miſtaken in his concluſion for want of ſtating the queſtion properly. He compares what the part does in transferring its allegiance with what the whole does when it alienates the part. Whereas when the part transfers its allegiance, this in reſpect of the ſociety is only the withdrawing of allegiance, and ought therefore to be compared with what the whole does, when it withdraws protection. In this compariſon there is no difference between their reſpective rights: if neceſſity by taking away the obligation of the ſocial compact allows the part to withdraw allegiance; a like neceſſity will upon the ſame principle allow the whole to withdraw protection.

This reaſoning may with very little alteration be applyed to a ſingle member of a civil ſociety, who, though he has committed no crime, is demanded by an enemy. Though no perſon has a right to leave the ſociety, to which he belongs, unleſs the public either expreſsly or tacitly conſents, that he ſhould leave it; yet where the ſociety is in ſuch circumſtances, that protection, which is the end of ſocial union cannot be had, this neceſſity will ſuperſede the obligation of the ſocial compact, and will allow him to provide for himſelf by quitting the ſociety. A like neceſſity on the part of the ſociety, where it cannot defend itſelf, if it undertakes the defence of ſome particular perſon, who is a member of it, will juſtify the withdrawing of protection. This conduct of the ſociety will appear the more reaſonable, if we obſerve, that it does no damage to the individual: for if the ſociety could not defend itſelf without deſerting him, it certainly could not defend him, if it would.

But

But the notion of deſerting a ſubject differs from the notion of delivering him into the enemys hands. A right only to deſert him leaves him at liberty to provide for his own ſafety as well as he can. Whereas a right to deliver him up implys an obligation on his part to ſubmit to be delivered up, though he might be able to make his eſcape and to ſecure himſelf, and a right in the ſociety to ſeize him by force and prevent him from eſcaping, till it has put him into the enemys power.

The principle, upon which Grotius ſets out in examining this queſtion, is, that the ſubject, whom the enemy has demanded, is obliged to deliver up himſelf: and from hence he deduces a right in the ſociety to compel him by force to diſcharge this duty; if he refuſes to diſcharge it of his own accord. It would in effect be to take the point in diſpute for granted, if Grotius, when he argues, from the obligation of the ſubject to deliver up himſelf, to eſtabliſh the ſocietys right of delivering him up by force, had conſidered this obligation as a matter of ſtrict juſtice, which is due from the ſubject to the ſociety. For undoubtedly the ſociety has a right to compel the ſubject by force to do whatever in ſtrict juſtice it can demand of him. So that to lay it down as a firſt principle, that the ſubject is under a ſtrict or perfect obligation to deliver up himſelf, is the ſame as if it had been taken for granted, or laid down as a firſt principle, that the ſociety has a ſtrict and perfect right to deliver the ſubject by force. But Grotius only ſuppoſes, that it is an obligation of the imperfect ſort, a duty of humanity or benevolence on the part of the ſubject, to prefer the preſervation of a multitude to his own ſafety. But if this is only an

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imperfect obligation, we might queſtion, whether the ſubject can be compelled to diſcharge it: for in general, where a duty is in its own nature of imperfect obligation, and there is no poſitive law, which has ſo far changed the nature of it, as to make it a duty of ſtrict juſtice, the law of nature gives no right to compel the performance of ſuch a duty. To this our author replys, that amongſt equals there is indeed no right to compel any perſon to diſcharge a duty of imperfect obligation; but a ſuperiour can of right compel an inferiour to the practice of any virtue whatſoever; and this right is neceſſarily included in the notion of ſuperiority. The ſtate therefore may lawfully deliver up the ſubject by force, if he refuſes to diſcharge the imperfect duty of delivering up himſelf. I ſhall not inſiſt upon its being uncertain, whether in ſuch a diſtreſſed condition of a nation, as is here ſuppoſed, a powerful enemy, who makes this unreaſonable demand, would be ſatisfyed, if it was complyed with: for though this uncertainty might be urged as a reaſon, why the ſubject is not obliged, even imperfectly, to deliver up himſelf, becauſe by ſuch an act he might ſacrifice his own ſafety without preſerving the ſociety; yet the terms of the queſtion exclude the ſuppoſition of ſuch an uncertainty; ſince the queſtion is not, what the ſociety has a right to do in order to try, whether it cannot preſerve itſelf, but what it has a right to do, when a compliance with the enemys demand is the way and the only way to preſerve itſelf. Nor ſhall I enquire how far the general law of benevolence would bind a man to give up his own life for the ſake of preſerving a multitude; becauſe this is an enquiry, which is likely to introduce much declamation on both ſides and little preciſion of

either

either. And it is the leſs neceſſary to enter into this enquiry; becauſe if we ſuppoſe this firſt principle of our author to be true, it will not ſupport his concluſion. Civil ſuperiority is a right of preſcribing to the members of a ſociety ſuch a conduct, as is conducive to the general good, and of enforcing what is ſo preſcribed. We muſt therefore allow, that where any duty, which is naturally of imperfect obligation, appears to the public wiſdom to be conducive to this end, a civil ſociety has an authority derived from the ſocial compact to preſcribe this duty by poſitive law: and when it is thus preſcribed, it becomes a duty of ſtrict juſtice, and the ſubjects may be compelled by force to diſcharge it. But though we are ready to allow this, I do not ſee how [n] Grotius can contend for it, or argue from it, conſiſtently with himſelf: becauſe his general opinion is, that no civil authority can make uſe of force to compel the practice of any duties, that are of the imperfect ſort, and particularly to compel the practice of benevolence. His conſiſtency however is not the matter now in hand. If the principle itſelf is true, he may argue from it in this queſtion, notwithſtanding he elſewhere contradicts it, provided he argues from it rightly. But this is the point, in which he fails. A civil ſociety has authority to preſcribe duties of imperfect obligation, and then to compel the ſubjects to obſerve them. But they muſt be firſt preſcribed by poſitive laws, before ſuch compulſion can of right be made uſe of: for till poſitive laws have made them duties of perfect obligation, they continue to be, what they were naturally, duties of imperfect obligation, and cannot be exacted by force. If therefore our authors reaſon, upon which he endeavours to eſtabliſh the

[n] L. II. C. XX. § XX. [o] See B. II. C. V. § XIV.

right

right of a civil ſociety to deliver up one of its innocent members to an enemy, that demands him, will eſtabliſh this right at all, it can only be in thoſe ſocieties, if there are any ſuch, which have preſcribed by poſitive laws, that any ſubject, who is thus demanded by an enemy, ſhall deliver himſelf up. You may ſay, that a command of the public, which is given at the very time, will ſtand in the place of a law, and that, if the ſociety has a right to eſtabliſh a poſitive law for this purpoſe, it has an equal right to give an occaſional command for the ſame purpoſe. But this is a miſtake: for what is enjoyned by law relates equally to all the members of a civil ſociety, ſo as to lay the ſame burden upon all in general: and it is merely accidental, if the law, when it comes to be put into execution, ſhould affect only one member in particular: it had no view to him in particular, but was deſigned to affect all alike, whenever they ſhall happen to be in the ſame circumſtances, that he is. But the burden, that ariſes from an occaſional command, is originally deſigned to be laid upon one only: and without a freſh command the like burden will not fall upon any others, even though their circumſtances ſhould happen to be the ſame with his. Now each member is obliged by the ſocial compact to joyn with the reſt in ſupporting the ſtate and in advancing its welfare. But this compact does not bind any one member to purſue theſe ends alone, and conſequently does not give the ſtate any authority to preſcribe, that any one member ſhall purſue theſe ends, by ſuch occaſional commands as oblige him in particular, and produce no obligation upon the other members, even though they ſhould come into the ſame circumſtances. In military ſervice a ſoldier may indeed

indeed be ordered by his commanding officer to a poſt, which he cannot defend without the hazard, or rather without the probable loſs, of his life. This appears at firſt ſight to be an occaſional command of much the ſame ſort with the command, that we have been ſpeaking of. But a little attention will ſhew us the difference between them. All the members of a civil ſociety, who have voluntarily engaged to perform military ſervice, are ſubject to the military laws of it, which, however they may be diſtinguiſhed by name, are part of the civil law. Theſe members therefore are all of them obliged, as occaſion requires, to hazard their lives in the ſame manner by maintaining ſuch poſts, as they are ordered to. And what the commanding officer does by ordering any particular perſon to a poſt of certain danger, is only a particular application of this general law. Thus the occaſional command, which is given to an innocent member of a civil ſociety, to deliver himſelf up to an enemy, is not founded in any previous law, which would extend in like circumſtances to all the other members, but is in the original deſign of it confined to him in particular. Whereas what may be called occaſional commands of ſuperiour military officers are in effect only the occaſional applications of ſuch a general law to one particular perſon, as in its original deſign extends to all, who ſhall ever be in the ſame circumſtances, that he is in.

The topics, that are commonly made uſe of in this queſtion, are, on one ſide, that every perſon conſents to become a member of a civil ſociety with a view to his own benefit, and on the other ſide, that every member of a civil ſociety is obliged to promote the benefit of the whole. But whilſt I think, that a nation

has no right to deliver up an innocent member to an enemy, and that the member demanded by the enemy is not obliged to deliver up himſelf, I do not think, that the firſt of theſe topics will eſtabliſh the truth of this opinion. For the private view, which a man has to his own intereſt, when he enters into a civil ſociety, is not the proper meaſure of the ſocietys right over him, or of his duty towards it, after he is become a member. The ſocial compact is a bargain between him and the ſociety: and in this bargain, as in all others, the mutual rights and obligations, which are produced by it, are not determined by the particular view or purpoſe, which led one of the parties to agree to it. Theſe rights and obligations depend upon the mutual agreement of both the parties, and conſequently cannot be ſettled without conſidering the views of both. A member of any ſtate might deſign to advance his own particular benefit by becoming a member: but the ſociety no otherwiſe conſents to this deſign, and no otherwiſe eſtabliſhes it into a right on his part, or obliges itſelf to concur with him in it, than upon condition of his conſenting to ſecure and advance the general good. Whatever extenſive views therefore he might have of obtaining his own benefit; the extent of his right to purſue it, as he is a member of the ſociety and under the obligation of the ſocial compact, will depend upon the limitation, which ariſes from this compact, and reſpects the ſecurity and good of the whole. The other topic however, which is commonly made uſe of on the contrary ſide of this queſtion, will not prove, that the ſtate has a right to deliver up an innocent member to an enemy, who demands him. He is obliged, as he is a member of the ſociety, to promote the

the benefit of the whole. But this obligation is not abſolute or unconditional. The benefit, which he is obliged to promote, is a benefit, in which he is to have a ſhare in common with all the other members, and which they according to the reſpective duties of their ſeveral ſtations are obliged to aſſiſt in promoting in common with him. And ſuch an obligation on his part cannot give the ſociety, which conſiſts of all the other members, a right to compel him to advance or ſecure a benefit, in which he cannot poſſibly have any ſhare, and towards the advancing and ſecuring of which no member, beſides himſelf, contributes any thing. But it is time to leave this digreſſion and return to the law of nations.

Members of a nation are accountable for injuries done by it.

XIII. [p] The ſeveral members of a civil ſociety are parties by the law of nations in any injury, that the ſociety does: for this law conſiders ſuch a ſociety as one collective perſon: and conſequently an injury, which is the act of this collective perſon, muſt in the view of this law be the concurrent act of its ſeveral parts or members.

But in a perfect democracy the act of the nation is the immediate and direct act only of the majority; whilſt the minority of the members, who are overruled by the majority, diſſent from it. And in like manner the act of a nation under other forms of government is the immediate and direct act of the ſupreme governours; whilſt the ſubjects either know nothing of what is done, or contribute nothing towards it by their conſent, or perhaps diſapprove of it. How therefore can the law of nations be the ſame, as to the matter of it, with the law of nature: ſince the former law makes thoſe parties in an injury, who have

[p] Grot. L. II. C. XXI. § VII.

never immediately or directly conſented to it, or whoſe conſent was of no moment in producing it? What we have [q] elſewhere ſaid about the obligation of civil laws will help to explane this matter. No perſon is naturally obliged to any thing, beyond what the law of nature preſcribes, without his own conſent. But in a civil ſociety the ſeveral members are obliged by the civil laws of it; though theſe laws differ in the matter of them, from the law of nature, and are eſtabliſhed in a perfect democracy by the majority, without the direct or immediate conſent, or rather againſt the immediate and direct declaration, of the minority. For thoſe members, who are in the minority, have, in the ſocial compact, which made them parts of the ſociety, conſented to be concluded by the general act of the whole, which, if all and each of the members do not concur, is the act of the majority: and this remote or indirect conſent will naturally make the act of the majority their own, without their immediate and direct concurrence. Under other forms of civil government, there is a farther act of conſent, beſides that, which joyned the ſeveral individuals into one civil ſociety: this ſociety, after it is formed, agrees to veſt the ſupreme civil power in certain governours, or to give theſe governours authority to act for the whole. And what ſuch governours do, in their reſpective departments, is, in conſequence of this remote and indirect conſent of the ſociety, the act of the ſociety itſelf, and of all the members of which it conſiſts. Theſe compacts may in the firſt inſtance be called private ones in reſpect of the great body of mankind: they are made within the ſociety itſelf, and others, who are not parts

[q] See B. II. C. VI. § I.

of the ſociety, are neither obliged nor have any right to take notice of them. But they become public by the general conſent of mankind to conſider every civil ſociety in the ſame light, in which the ſeveral members of each ſociety conſider it, as one collective perſon, that is under the direction of the conſtitutional governours and that acts by theſe governours. This general conſent is the foundation of the law of nations: and in conſequence of ſuch conſent, what is done by any civil ſociety, or by the conſtitutional governours of it, becomes, in the view of the law of nations, the joynt act of the ſeveral members, even of thoſe members, who have not directly or immediately concurred in the act: becauſe by the compact, which eſtabliſhed the civil conſtitution, they have remotely or indirectly agreed to whatever is done by the conſtitutional governours.

But an injury lays the perſon, who commits it, under [1] two obligations. One of theſe obligations ariſes from the effects, which the injury produces: it does damage to thoſe, againſt whom it is committed; and from hence the authors of it, and the acceſſories to it, are obliged to make reparation. The other obligation ariſes from the guilt of the perſon, who commits it, that is, from his diſpoſition to do harm: this diſpoſition lays him under an obligation to ſubmit to puniſhment, and gives others a right to inflict it. Where an injury therefore is committed by a nation; the collective perſon of the nation is bound to make reparation for damages; and as far as it appears to have had any malicious deſign of doing harm, it is likewiſe liable to puniſhment. But it is neceſſary to enquire, whether all

[1] Grot. L. II. C. I. § II.

and each of the members of a civil ſociety are by the law of nations deemed parties to the injury, which the ſociety does, in both theſe reſpects; ſo that the injured nation has a demand upon each of them to make reparation for the damage, that has been done, and may likewiſe inflict puniſhment upon them ſeparately for the guilt of the public.

We have [s] elſewhere ſhewn, that every fault, though it is of the loweſt ſort, will produce an obligation to make reparation, and that thoſe, who are in the loweſt degree accеſſories to an injury are involved in this obligation. Thus far therefore the law of nations will be a natural law, if, in conſequence of the general conſent of mankind to conſider nations as collective perſons, it charges an injury, which has been done by the public, upon the ſeveral members of the ſociety, who are parts of the collective perſon; whether they immediately and directly conſented to it or not. There is therefore no occaſion to have recourſe, as [t] Grotius has, to any law of nations, which is poſitive as to the matter of it, in order to make the goods of the members of a ſociety anſwerable for the damages, that have been done by the ſociety itſelf or by the civil governours of it.

[u] But puniſhment is not juſt, where there is no guilt nor can any act of conſent make it juſt by the law of nature, except ſuch an act of conſent, as is an evidence of a malicious temper, or of a diſpoſition to do harm. Now the conſent, which makes all and each of the members of a civil ſociety parties in an injury, that the ſociety does, is only remote and indirect. All and

[s] See B.I. C. XVII. § XIV.
[t] L. III. C. II. § II.
[u] Grot. L. II. C. XXI. § VII.

each

each have conſented immediately and directly to be concluded by the act of the majority, or of the governing part. In this conſent there is no guilt, or no evidence of a diſpoſition to do harm: becauſe a civil ſociety is formed for ſuch purpoſes, as are innocent in reſpect of the great body of mankind. And whatever malice or diſpoſition to do harm may be evidenced by any act of the majority, or of the governing part; the minority, or the ſubjects, conſent to this act only remotely and indirectly. But a remote or indirect conſent, which is inferred only from the ſocial compact, cannot conſiſtently with the law of nature be deemed an evidence of a diſpoſition to do harm. The law of nations therefore, which is nothing elſe but the law of nature applyed to the collective perſons of civil ſocieties, will not allow the minority, or the ſubjects, to be puniſhed ſeparately, for what is done by the ſociety or by the civil governours, either againſt their immediate and direct conſent, or at leaſt without it. All and each of the members are ſo far parties in an injury, which is committed by the ſociety, as to be ſeparately obliged to make reparation of damages: but thoſe only, who are the authors of the injury, or have made themſelves parties to it by their immediate and direct conſent, can juſtly be puniſhed for it ſeparately. In the mean time the law of nations conſidering the whole ſociety as one collective perſon allows this collective perſon to be puniſhed for ſuch injuries, as argue any guilt, or are evidences of a diſpoſition to do harm. And though the innocent members cannot juſtly be puniſhed ſeparately for the guilt of the public, yet in the puniſhment of the public they will be ſufferers. Nothing can juſtly be taken from them,

which they have a right to, as they are individuals: but when the ſociety is deprived of what belonged to it as a ſociety, the innocent members will ſhare in the loſs, in conſequence of their accidental connection with the ſociety. [m] Grotius has mentioned ſeveral ways in which a nation may be puniſhed. Firſt, he ſays, it may be puniſhed by being diſſolved, which puts an end to the exiſtence of a nation, as death puts an end to the preſent exiſtence of individuals. A ſecond way of puniſhing a nation is by reducing it to a province, which he compares with puniſhing an individual by ſervitude. Or thirdly a nation may be puniſhed by depriving it of its public goods, ſuch as the walls of its towns, its naval ſtores, or ſhips of war, or arms, or treaſure; and this ſort of puniſhment he compares with the confiſcation of the goods of an individual. The innocent members of the ſociety will probably be in a worſe ſituation than they were before, or will be loſers; when the ſociety is puniſhed in any of theſe ways. But what they thus ſuffer from their accidental connection with the ſociety, is no more to be reckoned a puniſhment, than what one individual ſuffers by means of his accidental connection with another individual, who has committed a crime and is puniſhed for it.

One nation may lawfully aſſiſt another in war.

XIV. [n] The law of nations allows civil ſocieties, in the ſame manner as the law of nature allows individuals, to aſſiſt one another in war: and whatever makes a war juſt in reſpect of the principal nation, will make it juſt likewiſe in reſpect of the aſſiſtant nations.

Where two nations are at war, the law of nations will not only allow a third nation to give its aſſiſtance to the party, which has a juſt cauſe of war, but may

[m] Ibid. [n] Grot. L. II. C. XXV. § IV. V. VI.

even

even enjoyn this conduct as a matter of benevolence or humanity, if this party is too weak to do itſelf juſtice, and is in danger of being unjuſtly oppreſſed. But the duty of benevolence amongſt nations, as well as amongſt individuals, is of the imperfect ſort, and admits of prudential conſiderations; provided theſe conſiderations are tempered with honeſty and ſincerity. As an individual is not obliged to undo himſelf by his kindneſs towards others; ſo no nation is obliged to ruin its own affairs by entering into a war in favour of another.

Expreſs compacts will give one nation a perfect right to demand the aſſiſtance of another. But theſe compacts muſt be ſo conſtrued as to make them conſiſtent with the law of nature. A nation can no more bind itſelf by compact, than an individual could, to do what the law of nature forbids; ſuch compacts are void, as far as the matter of them is unlawful: and conſequently no compact of alliance will oblige any nation to aſſiſt another in war, if the war is unjuſt.

There is ſome room to doubt, whether unſocial and tyrannical injuries, which the ſubjects of one nation receive from their civil governours, will juſtify another nation in making war upon thoſe governours: becauſe by the law of nations every nation is one entire and diſtinct body having an excluſive juriſdiction of its own, and no other nation can of right take notice of any thing, which paſſes within it, and relates only to its own members. Upon this account I cannot agree with [w]Grotius, that a war undertaken by a foreign nation in defence of the injured ſubjects will

[w] Ibid. § VIII.

be

be juſt, even though the ſubjects had in thoſe circumſtances no right to make war for themſelves. If no foreign nation has any right to take notice of what paſſes between the ſubjects and the governours of another nation; the injuries, which the ſubjects ſuffer from the governours, can no otherwiſe juſtify a foreign nation in making war for the redreſs of thoſe injuries, than as they are brought under its notice by a requeſt from the ſubjects. And if the ſubjects have no right of reſiſting the governours, where they are thus injured, they can have no right to make this requeſt; becauſe they, who cannot lawfully make war by themſelves, cannot lawfully employ another to make war for them. Grotius replys here, that where any perſon cannot lawfully do an act upon account of ſome impediment, which is merely perſonal and does not ariſe out of the nature of the act itſelf; this act, if it will be beneficial to the perſon, who is ſo hindered from doing it, may lawfully be done by ſome other perſon, who is not under the ſame impediment. Thus a minor is hindered by the perſonal impediment of his non-age from going to law for himſelf; but his guardian, who is not under the ſame impediment, may go to law for him. And in the caſe now before us, the impediment, which makes it unlawful, if it is unlawful, for ſubjects to make war in defence of themſelves againſt the tyranny of their governours, is merely perſonal, and does not ariſe out of the nature of the act: for in general an injury is a juſtifyable cauſe of war; and it is nothing but the merely perſonal relation between the ſubjects and their governours, that can be ſuppoſed to render ſuch a war unlawful to them. But the general principle, upon which our author here proceeds, cannot

not be applyed to this queſtion without a reſtriction. Where one perſon cannot do an act upon account of ſome impediment, which is merely perſonal; it is no otherwiſe lawful for another perſon, who is not reſtrained by the ſame impediment, to do this act for him, than upon a ſuppoſition, that this other perſon is not reſtrained by ſome other impediment. If the ſubjects in any nation could not lawfully reſiſt the injuries of their governours, the impediment, which makes ſuch reſiſtance unlawful, would indeed be merely perſonal; and a foreign nation is not reſtrained from making war in their behalf by the ſame impediment. But there is another impediment in the way of this foreign nation: it is reſtrained by the law of nations from taking notice of any thing, that paſſes in a ſociety, which is diſtinct from it, and has a juriſdiction within itſelf. This impediment cannot be removed without the requeſt of the injured ſubjects: and ſuch a requeſt could not lawfully be made, if the ſubjects had no right of reſiſtance: for here their perſonal impediment takes place, and what they cannot lawfully do for themſelves, they cannot authorize another to do for them. Thus the law of nations hinders the foreign nation from taking up arms for the injured ſubjects upon its own motion; and if the ſubjects have no right of reſiſtance, there would be a perſonal impediment in their way, which would hinder them from calling it in to make war for them.

But upon ſuppoſition, that the injured ſubjects in any ſociety have a right to reſiſt the tyranny of the civil governours; as theſe ſubjects will have a right to make war for themſelves, ſo they will likewiſe have a right to ſolicit and to procure all the aſſiſtance, that they can

can. And when a foreign nation is thus ſolicited to give them its aſſiſtance, the law of nations will not ſtand in its way. For this law regards civil ſocieties only ſo far as they are collective bodies of men united by a ſocial compact, and inveſted by means of this compact with civil juriſdiction. But the ſubjects have then only a right of reſiſtance, when the ſocial compact is broken, or in ſuch caſes, as civil juriſdiction does not reach. The law of nations therefore takes no notice of theſe caſes: they only fall under the notice of the mere law of nature; and this law will not hinder any perſon from giving aſſiſtance to any other, who is injured.

What is lawful in war.

XV. We have [x] ſeen, that a ſolemn war is called a juſt one according to the law of nations, becauſe it comes up to the higheſt notion of war, in the view of the law of nature applyed to civil ſocieties as to moral perſons, or is a perfectly public war; and not becauſe it produces any effects of right by a poſitive law of nations. The peculiar effects, which [y] Grotius ſuppoſes to be confined to a ſolemn war, and to ariſe out of ſuch a poſitive law, are impunity for what is done and property in what is taken. If we would endeavour to juſtify all, that nations do in war, and all the claims, that they pretend to derive from it; we muſt indeed have recourſe to a poſitive law of nations, which is not only different from the law of nature, but contrary to it. But inſtead of forming a law out of their practice, in order to juſtify the practice itſelf, it is more reaſonable to enquire how far theſe two effects are produced by the only law of nations, that has any real foundation, that is, by the law of nature, as it is applyed by poſitive conſent to the collective perſons of

[x] See § X. [y] L. III. C. IV. § III. C. VI. § I.

civil

civil ſocieties. And perhaps in the courſe of this enquiry we ſhall find, that theſe effects, as far as they are conſiſtent with reaſon, are not confined to ſolemn wars only.

The law of nature has not preciſely determined, how far an individual is allowed to make uſe of force, either to defend himſelf againſt an injury, which is attempted; or to obtain reparation of damages, where he, who did the damages, refuſes to make reparation; or to bring an offender to juſt puniſhment, where he holds out againſt it. What we can collect from this law is only this general rule, that ſuch uſe of force, as [z] is neceſſary for obtaining theſe ends, is not forbidden. If inſtead of ſuppoſing one individual to be acting againſt another in the purſuit of theſe ends, we ſuppoſe a number of individuals to be occaſionally combined on each ſide, the rule will ſtill be the ſame: whatever one individual might lawfully do againſt another; a number of individuals on one ſide may lawfully do the ſame againſt a number of individuals on the other ſide. The difference, between two ſuch parties of individuals and two nations, depends upon the poſitive and general conſent of mankind to conſider every nation as a collective perſon or moral agent. In a number of individuals, who occaſionally combine together, no one is a party in any act, unleſs he conſents to it or joyns in it immediately and directly: whereas by the law of nations each of the members of a nation is a party in the act of the ſupreme governours, without ſuch immediate and direct conſent. Upon this principle a whole nation and each of its members may lawfully be treated as enemies in a public war. But it does

[z] Grot. L. III. C. I. § II.

not

not follow from hence, that all the members may be lawfully treated alike: though we may lawfully kill ſome of them, it does not follow, that we may lawfully kill any of them without diſtinction. For the general rule, which is derived out of the law of nature, is ſtill the ſame: no other uſe of force is lawful, beſides what is [a] neceſſary. We have therefore no right to take away the lives of thoſe parts or members of the adverſe nation, that we can get into our power, without proceeding to this extreme uſe of force. The law of nature does not forbid the killing of thoſe, who are actually in arms againſt us, and cannot be reduced into our power by any other means. But if an army, or any ſmall parties of an army, come into the territories of the enemy, notwithſtanding they are at liberty to treat the [b] inhabitants, who are not in arms, as enemies, yet they have not a general liberty to kill them. The plane reaſon, why they have not this general liberty, is, becauſe the death of the inhabitants, who are not in arms, is not neceſſary for obtaining the juſt ends of war: and all harm, which exceeds what is neceſſary, is cauſeleſs harm. Even they, who are in arms, whether they are the ſtanding armed force of the hoſtile nation, or any of the other members of it, who arm themſelves occaſionally, cannot lawfully be killed, if they quit their arms, and ſurrender their perſons. It may be neceſſary, when they are thus in our power, to guard againſt any future oppoſition, that they might make to us, by taking their arms from them; or by compelling them to give ſecurity, that they will not bear arms againſt us for a certain time, or during the continuance of the preſent war; or by

[a] Grot. L. III. C. XI. § II. [b] Grot. ibid. § IX X XII.

making

making them priſoners. But if their life can be ſpared, without defeating the juſt ends of war, we have no right to take it away. In the ſiege of a town, many of the inhabitants, who are not in arms, may happen to be killed. This is ſuch a chance of war, as the law of nature will excuſe. For if the act of beſieging the town is lawful, the accidental conſequences, which follow from taking the neceſſary ſteps to carry on this act effectually, are not chargeable upon the beſiegers. The inhabitants, as they are members of the adverſe nation, may be treated as enemies: and though the law of nature would forbid this harſher kind of hoſtile treatment, if there was an opportunity of obtaining our lawful purpoſe without it; yet where it was not principally deſigned, and was made neceſſary by accident, this law does not condemn it.

The exceptions to this rule of not killing thoſe perſons, who never were in arms at all, or who, though they have been in arms, have ſurrendered themſelves, are very few. If they are conſidered as members of the nation, with which we are at war, nothing more is neceſſary in the firſt inſtance, than to get them into our power. The law of nature therefore will not allow us to go farther. But if they, whom we thus get into our power, have been guilty of any previous crime, for which they deſerve death, this law does not forbid us to inflict this puniſhment, any more than if they and we were members of no ſociety at all, but were ſtill in the original ſtate of nature.

[c] The obſtinacy of holding out long in a ſiege is not one of theſe crimes: for a diſcharge of their duty towards their own nation is not in its own nature a crime

[c] Ibid. § XVI.

againſt

againſt the other. There might perhaps be ſome advantage in putting a garriſon to the ſword for holding out long: as ſuch an example might be a means to deter others from giving the beſiegers the ſame trouble. But neither this, nor any other motive of mere utility, will render it juſt to take away the lives of thoſe, who are in our power, and have not deſerved to loſe them. Neither is retaliation a juſtifyble cauſe for killing priſoners of war: though our adverſaries ſhould have killed the priſoners, whom they have taken from us, this will not juſtify us in killing the priſoners, whom we have taken from them. The law of nature allows of retaliation, only where they, who have done harm, are made to ſuffer as much harm as they have done. But to kill ſuch priſoners of war, as are in our power, becauſe the nation, to which they belong, has treated our countrymen in this manner, would be to do harm to one perſon, becauſe harm had been done by another. An injury, which is done by a nation does indeed communicate itſelf to all the members of that nation; and ſuch a communication of guilt is all, that can be pleaded for the retaliation, of which we have been ſpeaking. But [d] Grotius very truly replys here, that to puniſh captives or priſoners of war in this manner would be to puniſh them in what is their own as individuals: whereas the national guilt can only be communicated to them, as they are members of the offending nation: and conſequently the proper puniſhment of it ſhould only be inflicted on them as they are members of the offending nation, and not as they are individuals. If retaliation is not a juſt cauſe for killing priſoners of war, much leſs will it be a juſt cauſe for

[d] Ibid.

killing

killing hoſtages. Thoſe perſons, who are put into our hands as hoſtages, become pledges by their own voluntary act for the performance of ſomething, which their nation has engaged to do. But by their own voluntary act they can pledge only what is in their own power to diſpoſe of. They may give up their liberty as a ſecurity for the fidelity of their nation: but their lives, though they are their own to keep, are not their own to diſpoſe of, and conſequently cannot be given in pledge.

The reaſon, why the act of holding out long in a ſiege is no perſonal crime in them, who hold out, has already been hinted at. This reaſon will conclude more ſtrongly in favour of thoſe, who have only born arms, and have given us no more than the common oppoſition of war. The members of a civil ſociety are obliged in general, and thoſe members, that have engaged themſelves in the military ſervice of it, are obliged in particular, to take up arms and to fight for it at the command of the conſtitutional governours, in the defence and ſupport of its rights againſt its enemies from without. There is no crime in entering into the ſocial compact, from whence the general obligation to bear arms for theſe purpoſes is derived. This compact as it only binds the ſeveral members of the ſociety to purſue the ends of civil union, is innocent in reſpect of the reſt of mankind. And if there is no crime in this compact, which would bind all the members alike to diſcharge the duties of war, there can be no crime in a particular compact, by which ſome of the members undertake to diſcharge the ſame duties, inſtead of the reſt. The conſent, by which the ſubjects in general, or the ſoldiery in particular, lay themſelves under theſe

obligations, is the only act, that can by the law of nations be looked upon as a perſonal act of the individuals, who bear arms. In conſequence of the general conſent of mankind to conſider nations as collective perſons, whatſoever is done by the members of a nation at the command of the public or of the conſtitutional governours, who ſpeak the ſenſe of the public, is the act of the nation: and if the act is unjuſt, the guilt in the view of the law of nations is chargeable upon the nation, and not upon the individual members. I am now ſpeaking not of what will juſtify a man, who bears arms in war, to his own conſcience, but of what will juſtify him to the nation, againſt which he fights at the command of the nation, to which he belongs. If the war is planely and notoriouſly unjuſt, the obligation of the ſocial compact, or of any other compact, will not juſtify him to his own conſcience: becauſe no compact whatſoever can bind him to do, or excuſe him in doing, what the law of nature forbids. And if he was to fight as an independent individual, at his own choice and upon his own motion; thoſe, againſt whom he fights, might look upon the act of bearing arms againſt them in ſuch a war as a perſonal crime. But when they, with all mankind, have agreed to conſider the ſeveral members of a civil ſociety only as parts of a collective perſon, that act under the direction of the common will of ſuch collective perſon; however inexcuſable a man, who fights againſt them, might be, in the view of his own conſcience, or of the law of nature, which conſiders him as an individual, they cannot conſiſtently with this agreement, that is, they cannot conſiſtently with the law of nations, charge

him

him with having been guilty of a perſonal crime merely upon account of his having fought againſt them.

Thus far therefore I agree with Grotius, that ſome acts are lawful in war by the law of nations, which by the law of nature would be unlawful; and that this lawfulneſs conſiſts only in impunity, or that it is only external in the view of mankind, and not internal in the view of conſcience. But though I agree with him thus far, I differ from him in three particulars. Firſt; this impunity does not ariſe from a law of nations, which is purely poſitive, but from the poſitive conſent of mankind to apply the law of nature to civil ſocieties, as if each ſociety was a diſtinct moral perſon made up of its ſeveral members. For though the law of nations does in this inſtance grant impunity, where the law of nature would not grant it; yet this difference ariſes only from the difference of the perſons, to which the ſame law is applyed. The law of nature applyed to individual perſons would make it a crime, not only in the view of conſcience, but likewiſe in the view mankind, to fight in an unjuſt war. But when mankind have agreed to keep individuals out of ſight, as it were, and to apply this law only to collective perſons; they cannot conſiſtently with this agreement charge the parts of theſe collective perſons with any ſeparate guilt, for what is done under the direction of the common or collective will. Secondly; this impunity for what is done in war is confined to the acts of the ſeparate members of civil ſocieties, and does not extend to the corporate acts of the ſocieties themſelves. How far what nations do collectively obtains impunity by the law of nations will appear hereafter. But we may obſerve here, that, if this law is nothing elſe but

the law of nature applyed to the collective perſons of civil ſocieties, no acts, which could not be done by individual perſons conſiſtently with the law of nature, can be done by collective perſons conſiſtently with the law of nations. Thirdly; Grotius confines the external lawfulneſs of what is done in a war, which is internally unjuſt, to ſolemn wars only: whereas this external lawfulneſs in reſpect of the members of a civil ſociety extends to public wars of the imperfect ſort, to acts of reprizals or to other acts of hoſtility. By giving the name of public war to reprizals or other acts of hoſtility, which fall ſhort of being ſolemn wars, I ſuppoſe the reprizals to be made, or the acts of hoſtility to be committed, by the authority of a nation, though it has not ſolemnly declared war. For if the members of the nation make reprizals, or commit acts of hoſtility, without being thus authorized, they are not under the protection of the law of nations: as they act ſeparately by their own will, ſo they are ſeparately accountable to the nation, againſt which they act.

[e] Priſoners of war are indeed ſometimes killed; but this is no otherwiſe juſtifyable, than as it is made neceſſary either by themſelves, if they make uſe of force againſt thoſe, who have taken them, or by others, who make uſe of force in their behalf, and render it impoſſible to keep them. And as we may collect from the reaſon of the thing, ſo it likewiſe appears from common opinion, that nothing but the ſtrongeſt neceſſity will juſtify ſuch an act: for the civilized and thinking part of mankind will hardly be perſuaded not to condemn it, till they ſee the abſolute neceſſity of it.

[e] Grot. L. III. C. XII. § I.

The

The ſame general rule, by which we are to guide ourſelves in judging, how far it is lawful to deſtroy the perſons of our enemies in a public war, is the rule, by which we muſt be guided in judging, how far it is lawful to ravage or to waſte their country. If this is neceſſary to be done in order to bring about the juſt ends of war, it lawfully may be done; but not otherwiſe. Thus if the progreſs of an enemy cannot otherwiſe be ſtopped, we may deſtroy the forage or other proviſions, that are in the way: or if towns or villages would afford them ſuch poſts, as would give them a conſiderable advantage againſt us, and we cannot otherwiſe prevent them from gaining theſe poſts, we may deſtroy ſuch towns or villages. To waſte a country, unleſs for ſome ſuch neceſſary reaſons as theſe, is cauſeleſs harm.

Under the notion of waſting or ravaging a country I do not include plundering it: this may poſſibly not be cauſeleſs harm; becauſe they, who plunder it, may acquire the goods, which they take from the enemy: and if the law of nature will give them property in the goods, which are ſo taken; the ſame principle, upon which ſuch property is acquired, will juſtify the act of taking them.

I ſhall not detain the reader here with a particular enquiry, how far fraud is lawful in war. The general principles, upon which queſtions of this ſort are to be determined, have been ſtated [g] already.

Theſe rules, which are derived out of the law of nature applyed to the collective perſons of civil ſocieties, are repreſented by Grotius as temperaments, by which the law of nature qualifies and abates the

[g] See B. I. C. XIV. § III. IV

rigour of a purely poſitive law of nations. He grants, that they are ſuch rules, as a nation muſt obſerve, if it regards what is intrinſically juſt; but contends, that there is a poſitive law of nations, which allows a greater licenſe, and gives an extrinſic juſtice to what is done in ſolemn wars, though theſe rules are exceeded. We have already ſeen, that there is no cauſe, or no legiſlative power, by which ſuch a law could be produced or eſtabliſhed, and may now enquire, whether the effects of ſuch a law can be traced out in any extraordinary licenſe, which is peculiar to ſolemn wars.

No evidence of ſuch a law appears in the name of juſt war, which is uſually given to wars of this ſort, whether they are internally juſt or not. For the name of juſt war, as it is appropriated to ſolemn wars, without regarding the cauſes, upon which they are moved, is not intended to denote any external juſtice, which a purely poſitive law of nations allows promiſcuouſly to all ſuch wars; it is only intended to denote, that ſuch wars are perfect in their kind, or come up to the higheſt notion of a war of nations.

In the practice of nations, that are at war with one another, all rules, which ariſe out of the law of nature, are indeed ſometimes exceeded. The ſlaughter, which the army of a nation makes amongſt its enemies, is not always confined to thoſe, who are in arms, or to thoſe, whoſe lives cannot be ſpared conſiſtently with its own ſafety. Sometimes no quarter is given to ſuch as ſurrender themſelves; when it is not neceſſary to take away their lives. Sometimes priſoners of war are killed in cool blood; when there is no danger of their being reſcued, or of their riſing in arms againſt thoſe, who have taken them, and have them in their power. Some-

Sometimes in what are called military executions, not only the inhabitants of an enemys country, who are able to bear arms, though they never were in arms, are murdered, but the ſlaughter is extended to women and children. But though theſe and other enormities are practiſed in war; it is no conſequence, that there is any poſitive law of nations, which makes them lawful.

One evidence, which [h] Grotius produces of ſuch a law is, that, however criminal theſe practices are by the law of nature, they meet with no puniſhment amongſt nations, and that this general licenſe of tranſgreſſing the law of nature in war extends to all ſolemn wars whatſoever, even to ſuch as are internally unjuſt, in which the law of nature is ſo far from allowing outragious or unneceſſary force, that it does not allow the uſe of any force at all. The uſe of any force in an unjuſt war, and the uſe of outragious and unneceſſary force in any war, is criminal by the law of nature; and neutral ſtates, or ſtates, who are not concerned in the war, might, if this law was the rule, by which nations are guided in their conduct towards one another, puniſh the offending nation for ſuch criminal uſes of force. But ſince in ſolemn wars theſe criminal uſes of force obtain impunity, that is, ſince neutral ſtates do not interpoſe to puniſh a nation that is guilty of them, Grotius concludes, that ſuch wars, however unjuſt they may be either in their internal cauſes, or in the manner of carrying them on, have an external juſtice in the view of nations, which can only be given them by ſome purely poſitive law. The principal point to be conſidered here is; whether this is only an impunity in fact or whether it is an impunity of

[h] L. III. C. IV. § IV.

right. Though neutral ſtates do not in fact interpoſe to puniſh ſuch uſes of force in war, as are internally criminal by the law of nature; it is no conſequence, that they have no right to interpoſe. There is a prudential reaſon which will operate in this matter as univerſally as a law. Neutral ſtates cannot puniſh the injuſtice of what has been done in war without engaging themſelves in a war with the ſtate, which they undertake to puniſh. And an impunity, which thus ariſes in fact from the regard, that every neutral ſtate has to its own ſafety, is no evidence of a poſitive law, which has given an external rectitude to whatever is done in ſolemn war, and has eſtabliſhed a right to ſuch impunity.

Grotius, when he mentions this prudential reaſon, conſiders it, not as the immediate cauſe, which reſtrains neutral ſtates from puniſhing what has been done unjuſtly in a ſolemn war, but as a general motive, which induced all nations to lay themſelves under ſuch a reſtraint by a poſitive law. If the regard, which neutral ſtates have to their own ſafety, is the immediate cauſe of this reſtraint, it is only a reſtraint in fact; they are at liberty to judge for themſelves, how far it is conſiſtent with their own ſafety, or conducive to their own intereſt, to intermeddle in the quarrels of other ſtates, and are farther at liberty to act upon this judgment, either to intermeddle or not, as they think proper. But if it is only a general motive, which induced all nations to eſtabliſh ſuch a reſtraint by a poſitive law; they will then be under a reſtraint of right; and whatever their own intereſt may either allow of or recommend, they will be obliged to overlook whatever is done by other nations in a ſolemn war, whether it is internally juſt or not.

Whilſt

Whilſt a war is depending, which either is naturally unjuſt in the cauſes of it, or is carried on by ſuch outragious and unneceſſary acts of violence, as are naturally unjuſt; there can be no doubt about the right of a neutral ſtate to declare to the wrong doers, that it will join with the ſufferers, or about its right to put this declaration in execution; unleſs the unjuſt war is put an end to, or the unjuſt means of carrying it on are corrected. The civil governours of a neutral ſociety may indeed in one reſpect be ſaid to be reſtrained of right by what I have here called a prudential reaſon. They are obliged of right not to hazard the ſafety of their own ſociety in the quarrel of another. But this reſtraint ariſes naturally from ſocial union, and from the truſt, which is committed to ſuch governours, and not from any poſitive law of nations; it is an obligation, which regards their own ſociety only, and has no relation at all to any other civil ſociety whatſoever.

I am aware, that the interpoſition of a neutral ſtate, whilſt a war ſubſiſts, to check what is done in it againſt the rules of natural juſtice, is capable of being conſidered rather as a defence of the ſufferers, than as a puniſhment of the offenders. But it is not worth the while to debate, which of theſe two is the true nature and primary intention of ſuch an interpoſition. For if we allow it to be only a defence of the ſufferers, it will be an evidence, that there is no poſitive law of nations, which gives an external juſtice to whatever is done in a ſolemn war. If there was any ſuch law, nothing, which a nation ſuffers in a ſolemn war, could be externally unjuſt in the view of other nations; and conſequently no neutral ſtate could conſiſtently with ſuch a law interpoſe to defend the ſufferers. Since no perſon

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can lawfully be defended againſt what he ſuffers juſtly; it would be as contrary to the notion of this external juſtice, to defend thoſe, who ſuffer in a ſolemn war what is inconſiſtent with natural or internal juſtice, as to puniſh thoſe, who in ſuch a war do what is inconſiſtent with it.

After a war is ended by the conſent of the parties, who were concerned in it, there is ſome appearance of a law, which reſtrains neutral ſtates from taking notice of what has been unjuſtly done on either ſide, whilſt the war laſted. It would in the common opinion of mankind be thought no very juſtifyable reaſon, why one nation ſhould make war upon another, that the latter had done ſomething unjuſtly in ſome war with a third nation, which is now at an end, and in which the former, whilſt it laſted, was no way intereſted. But there is no occaſion to have recourſe here to a poſitive law of nations. The law of nature favours peace, and will therefore readily preſume, that no injuſtice has been done, or that all injuſtice which has been done, is made amends for, where the parties, who were concerned in a quarrel, have adjuſted the matter, that was in diſpute between them, to their own ſatisfaction. Grotius mentions another reaſon, why neutral ſtates have no right, after a war is over, to take notice of any natural injuſtice, that has been done in it on either ſide. But it is a reaſon, which is founded in nature, and will operate as a law without the aid of poſitive inſtitution. When the parties in a war are reconciled to one another, ſo that no complaint is made on either ſide; neutral ſtates cannot have ſuch evidence of what has been unjuſtly done in the war, as will warrant them to inflict puniſhment for what has been

been ſo done. The ſame hurt, which would be cauſeleſs and unjuſt by the law of nature, if it was done even in war deſignedly or out of choice, is allowed of by this law, if it was accidental or neceſſary. Without a fuller and clearer inſight therefore, than neutral nations can have into the cauſes and occaſions of what has been done in a war, after the parties in it are agreed, they cannot determine, whether it has criminally exceeded what the law of nature allows of, and is puniſhable or not.

But whether the impunity for what a nation does in war is an impunity in right or only in fact, it does not ſeem in the practice of mankind to be peculiar to ſolemn wars. For it is as unuſual for neutral ſtates, which are not concerned in a quarrel between two nations, to puniſh either of them for what has been done, when the war, which they make upon one another, is imperfect, as when it is begun with the ſolemnity of a declaration.

The ſecond evidence, that Grotius produces, of a purely poſitive law of nations is, that in ſolemn wars ſome practices are not allowable, which the law of nature does not forbid. The law of nature, where it allows us to take away the life of any perſon, preſcribes, ſays [i] Grotius, no particular manner of killing him, but leaves it indifferent, whether we kill him by ſome open means, which he may be aware of, or by the ſecret means of poiſon or of aſſaſſination. But the law of nations, at leaſt the law of more civilized nations, forbids the uſe of poiſon againſt an enemy in ſolemn war. An obſervation, which our author here makes upon the permiſſion of the uſe of poiſon in the law of na-

[i] L. III. C. IV. §XV. XVI.

ture,

ture, will help to explane this matter. It is generous to give any perſon, whoſe life we have a right to take away an opportunity of defending himſelf: poiſoning therefore, which gives him no ſuch opportunity, is a leſs generous way of killing him, than an open attack. However, if he has deſerved death, the favour of giving him an opportunity of defending himſelf is not due to him in ſtrict juſtice. What Grotius here ſays about deſerving death wants to be explaned. A criminal, who is by the civil law juſtly ſentenced to die, is properly ſaid to deſerve death: and as the law of nature does not preſcribe, ſo there is not, I preſume, any natural principle of generoſity, which recommends, one ſort of death, rather than another; except only that humanity ſuggeſts, and the law of nature requires, this puniſhment to be inflicted without any unneceſſary torture. In like manner an individual may in a ſtate of natural equality have committed ſuch a crime as to deſerve death for it: and where he has thus deſerved to die, they, who undertake to inflict the proper puniſhment upon him, may, conſiſtently with ſtrict juſtice and with generoſity too, put him to death in any manner, provided they obſerve the ſame caution about not giving him unneceſſary torture. But in a public war the ſoldiers, againſt whom we fight, are not guilty of any capital crime in what they do, and deſerve death no otherwiſe, than as they ſtand in the way of the execution of our right, and cannot be put out of the way, or be brought into our power, without it. And thus, notwithſtanding it is indifferent by the law of nature, in what manner a perſon, who has deſerved death, is killed, whether by poiſon or by open force; it does not follow, that they, who fight againſt us in public war, may lawfully be

be killed in any manner. In fighting upon the authority of their ſtate, they commit no capital crime, and do not properly deſerve death. Humanity therefore requires, that we ſhould not put them to death at all, if we can obtain the lawful purpoſes of war without it; and generoſity recommends it to us rather to run ſome hazard of our own lives, than to take away theirs unneceſſarily. But by poiſoning them, we put them to death at all events, whether it is neceſſary or not, that is, we take away their lives, without trying whether we cannot ſpare them and yet put ſuch a ſtop to their oppoſition, as to obtain the lawful purpoſes of war. From hence likewiſe we may underſtand, why the uſe of poiſoned weapons ſhould be more inconſiſtent with the law of nations, than the uſe of other weapons; not becauſe there is any purely poſitive law of nations, which forbids the uſe of ſuch weapons, but becauſe it is forbidden by the natural law of humanity and generoſity: for other weapons, though they may probably bring death, do not bring it ſo certainly as theſe, and leave even the wounded a chance of eſcaping with life.

In the buſineſs of aſſaſſinating the commanders of an army, or other leading perſons of a nation, with which we are at war, we may diſtinguiſh with Grotius between the perſons, who are employed in it, whether they are ſubjects of our own nation, or of the other. If they are our own ſubjects, the act cannot be defended upon his principle, which is, that we may lawfully kill an enemy wherever we find him, and that it makes no difference as to the lawfulneſs of our act, whether it is done by many or by few, by a whole army or by a ſingle perſon. But the firſt part of this

[s] Ibid. § XVIII.

prin-

principle is not true: the only right that we have in public war over the perſons of our enemies is to lay them under ſuch reſtraints, as are neceſſary to prevent them from oppoſing us: ſince therefore in order to prevent ſuch oppoſition it is not neceſſary to kill any, who are not in arms; becauſe they are in our power and we can reſtrain them by other means; the conſequence is, that we have no right to kill an enemy wherever we find him, unleſs he is in arms and reſiſts us by force. Thus the lawfulneſs of aſſaſſination in public war will at leaſt be confined to thoſe, who are in arms, and cannot be extended to any other perſons of the adverſe nation. In reſpect of thoſe, who are in arms, ſuch as the general of an army, or ſome other principal commanders in it; though the perſons, whom we employ, are members of our own nation, all that can be ſaid to defend aſſaſſination in point of generoſity is, that ſuch commanders either are or ought to be upon their guard againſt attempts of this ſort; and when they are engaged in oppoſing force to our lawful demand, there can be no great want of generoſity in taking away their lives by ſuch means, as it is their particular duty to be aware of and to guard againſt. But if we employ their own people, there is nothing to be ſaid in excuſe for the act: it is killing of them privately in ſuch a manner, as they cannot be ſuppoſed to guard againſt, and may in this reſpect, as to the want of humanity and generoſity, be reſembled to poiſoning: and as the act is unjuſt in the perſons, who are employed, this injuſtice will be communicated to us, who make ourſelves parties in it by employing them.

Property how acquired in war.

XVI. In a war, which is internally juſt, as a nation may take the perſons, ſo likewiſe it may ſeize upon

upon the goods of the enemies either moveable or immoveable, as far as ſuch ſeizure is a neceſſary means of bringing them to do what is right. But what is ſeized only for this purpoſe does not become the property of the captors: the poſſeſſion is juſt, till the purpoſe, for which the goods were taken, is anſwered; but as ſoon as the claims of the injured nation are ſatisfyed, the juſtice of the poſſeſſion is at an end.

There are however three ways, by which a nation in a juſt war may acquire property in the goods, which it takes from its enemies. Firſt a nation, that has been injured, has a right to reparation of damages. Reparation is made according to the law of nature, not only by recovering the thing, which we are unjuſtly deprived of, but likewiſe, where the very thing cannot be had, by recovering an equivalent out of the goods of the perſon, who has deprived us of it. And by the law of nations this right to obtain an equivalent extends to the goods of all, who are members of the nation, that has done the injury; not [l] becauſe the goods of private ſubjects are by any purely poſitive law made pledges to all the world for the good behaviour of the nation or of its conſtitutional governours; but becauſe, by the poſitive conſent of all mankind, the nation, though it conſiſts of many individuals, is conſidered as one collective perſon; and in conſequence of this general conſent all the members of this collective body are deemed parties in any injury, which the body does, as far as this injury produces a claim to reparation of damages in thoſe, againſt whom it is committed. [m] If a nation makes war to recover reparation of any damages, that have been done to it; this

[l] Grot. L. III. C. II. § II.

[m] Ibid. C. XIII. § II. III.

claim

claim to ſuch goods, as are taken in the war, takes place from the beginning of the war, to the extent of theſe damages. But if the enemy begins a war cauſeleſsly, and the nation, which defends itſelf, has ſuffered no injury from the enemy before the war began, this claim does not take place from the beginning; becauſe the nation can have no right to an equivalent, where it has ſuſtained no damage. However, this claim, though it did not begin with the war, will ariſe in the progreſs of it: for the war itſelf is an injury; and conſequently the nation, againſt which it is made, will have a right to reparation for all the damages, which are done to it in the war.

Secondly; a nation has a right to be paid the expences, that it makes in a juſt war. Theſe expences are indeed ſo many additional damages: for whatever the nation is forced to expend in recovering its right, is a loſs, which is occaſioned by the fault of the enemy, who witholds that right. As the nation therefore acquires property in the goods, which it takes from the enemy, to the amount of the original damages, that occaſion the war, and of the freſh damages, that are done in the war; ſo upon the ſame principle it acquires property in what it takes as an equivalent for the current expences, that are made in carrying on the war.

Thirdly; a nation, which has committed a crime, may be puniſhed, in the ſame manner with an individual, in the liberty of nature, by being deprived of its goods. But whilſt the offending nation thus loſes its goods, the nation, that takes them, will acquire property in them no otherwiſe, than either by being the firſt occupants, or by receiving the goods as a ranſom, by

by which the offending nation redeems itſelf from ſome other puniſhment. Grotius confines this way of acquiring property in war to ſuch goods only, as belong either to the collective body of the ſtate or to the criminal members of it. And this reſtriction is a very proper one: for though an injury, which is done by a nation, is communicated to all the members of it, as far as this injury produces an obligation to repare damages; yet the guilt of it, as it implys a diſpoſition to do harm, is confined to the collective perſon of the nation, and to thoſe particular members of it, who have made it their own act by their immediate and direct conſent.

Grotius agrees, that theſe are the propet meaſures of what can be acquired in war by the law of nature. But [a] he contends at the ſame time, that in this inſtance there are plane traces of a poſitive law of nations, which extend the right of war. For in the approved practice of nations, or at leaſt in ſuch practice, as is not condemned, whatever is taken in war is the property of the captors, though it is more than an equivalent for any damages, that have been done, or any expences, that have been made; and this claim of property is not confined to ſuch wars, as are internally juſt, but is extended to all ſolemn wars whatſoever, whether they are internally juſt or not.

But here we are apt to miſtake a right, which ariſes from the conſent of a nation, whoſe goods we have taken in war, for a right, which a poſitive law of nations gives us to thoſe goods, merely becauſe we have taken them. Though we had no juſt claim to them from the firſt, yet when we make peace with the na-

[a] L. III. C. VI. § II.

tion, from which they were taken, if they, or an equivalent for them, ſhould not be demanded, they become our own by the tacit conſent of that nation, without the aid of any purely poſitive law of nations. The ſureſt way of trying, whether it is the claim of war, or the claim of a tacit conſent in concluding a peace, which gives us property in all ſuch goods, as are taken in war, is to enquire what ſort of a right we have to them, before peace is concluded. There is no law of nations, which forbids our enemies to continue a war, when no other cauſe of diſpute remains, beſides our detention of ſuch goods, as we have taken in the war, beyond an equivalent for damages and expences. As the law of nature will allow this to be a juſt cauſe of continuing a war; ſo there is no practice of nations, and no general opinion of mankind, that determines otherwiſe. But if any law of nations had given us property in ſuch goods, the ſame law muſt neceſſarily condemn the adverſe nation, for continuing a war, merely becauſe we would not give them up: for the deſign of ſuch a war would be to take from us what the law of nations had made our own. This opinion, that all goods, which are taken in war, are not ſtrictly our own by any law of nations, till peace is concluded, that is, till ſome conſent either expreſs or tacit has made them our own by the law of nature, ſeems to be the general opinion of mankind in reſpect of immoveable goods, ſuch as fortifyed towns, which have been taken, or provinces, which have been over-run in war. The captors are looked upon, whilſt the war laſts, to be only in poſſeſſion of them: and though this poſſeſſion may help them to make a better bargain for themſelves in a treaty of peace, than they could do otherwiſe;

wiſe; yet the property, which they have in things of this ſort is deemed to be precarious, till a treaty of peace has aſcertained and eſtabliſhed it. It is uſual in treaties of peace to mention ſuch immoveable goods particularly; and the captors, if they acquire property in them, acquire it by expreſs conſent. We may therefore reaſonably conclude, that the property, which the captors have in all moveable goods taken in war, is likewiſe acquired in the ſame manner. The only difference is, that immoveable goods are generally of the moſt importance, are in the hands of the public, and can readily be returned; whilſt moveable goods are of leſs conſequence, are in private hands, and, becauſe they have either been conſumed or have not been kept together, cannot be returned ſo readily. For this reaſon, whilſt the property in the former is adjuſted by expreſs conſent, the property in the latter is left to paſs from the original owners to the captors by tacit conſent.

The law of nature, which thus gives the captors property in what they have taken in a ſolemn war, either as an equivalent for damages and expences, or by conſent of parties, will likewiſe give them property by the ſame means in what they have taken in the leſs perfect kinds of public war, in reprizals or in other acts of hoſtility, which do not come up to the notion of ſolemn war, for want of a declaration of war: the captors acquire a natural right in an equivalent for their damages and expences: if they have a natural right to any thing more, it muſt be acquired either by the expreſs or the tacit conſent of the nation, from which the goods are taken. And it will be difficult, either in the practice of nations or in the general opinion of the thinking part of mankind, to find any poſitive law,

which will prevent the captors of goods in theſe imperfect wars from acquiring property in them by theſe means. It is not more uſual for neutral nations to interpoſe in order to compel the captors to reſtore what they have taken in imperfect wars, than it is for them to interpoſe for the ſame purpoſe, where the goods of one nation have been taken by another in a ſolemn war. The parties concerned ſeldom meet with any obſtructions from without in making the beſt bargain for themſelves, that they can, in either ſort of war: and whatever we may hear ſaid about a purely poſitive law of nations; they are left to guide themſelves by no other law, beſides what obliges all nations, or rather the governours of all nations, in conſcience, and that is the law of nature applyed to the collective bodies of nations as if they were moral agents. It will be nothing to the purpoſe to urge, that whatever neutral nations may do, the nation, with which we are concerned, will enforce a poſitive law of nations, and if we have taken any thing from it in the way of reprizal, without declaring war, will not make peace with us again, till we have reſtored what was ſo taken or an equivalent for it. For this with very little variation may be ſaid of what is taken in a ſolemn war: the nation, from which we have taken it, if it has ſtrength enough to ſupport itſelf, will be no more willing to make peace with us, till we have returned the towns or the ſhips, or the other goods, that we have taken from it in a ſolemn war, or an equivalent for them: than if we had taken the ſame towns, or ſhips, or other goods in the way of reprizal without declaring war.

In what I have here ſaid about the captors of goods in war, I would be underſtood under the name of cap-

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tors to mean the nation, which takes them: for whether the goods ſo taken, when property is acquired in them, are the particular property of the individuals, who take them, or the general property of the nation, of which theſe individuals are members, is a diſtinct queſtion: and it belongs rather to the civil law, than to the law of nations, to determine this queſtion. Certainly no purely poſitive law of nations can naturally determine it: becauſe whatever other nations may have agreed upon amongſt themſelves; the laws, which regulate the mutual rights of each particular nation and its own members, muſt come from the nation itſelf. If in any particular nation the claim to what is taken in war has not been adjuſted by any written law, or by any cuſtom, which is an unwritten law, or by any occaſional grants, we may reaſonably enquire, how it ought to be adjuſted upon ſuch principles as are founded in civil union. Since every member of a civil ſociety acts in a public war as a part of the community, and not ſeparately as an individual, that is, in the right or upon the authority of the whole, and not in his own right, or upon his own authority, the natural conſequence is, that, whatever he acquires, it is acquired for the community and not for himſelf. [o] Grotius makes a diſtinction in this matter between public acts of war, and private acts, to which the war gives occaſion. He allows, that the acquiſitions, which are made by acts of the former ſort, though they are made by means of private perſons, are made for the public; becauſe the private agents are here only the inſtruments of the public: ſo that whatever is acquired by them, will accrue to the public, in the ſame manner as

[o] L. III. C. VI. § VIII. IX. X. XI. XII.

what is acquired by thoſe perſons, whom any man employs to do work for him, accrues to him, who employed them, and not to them, who do the work: it is his own work, though he does it by others, who are his agents; and conſequently the fruits or profits of the work belong to him. But as ſoldiers may get poſſeſſion of the goods of the enemy, whilſt they are in battle, or whilſt they are doing what the ſtate has commanded them to do; ſo they or other individual members of the ſtate, may have opportunities of taking the goods of the enemy, where they are not acting under any immediate command of the ſtate. When they are thus annoying the enemy by the general right of war, it is our authors opinion, that the captures, which they make, are their own. But this diſtinction between what is done in the immediate ſervice of the ſtate, and what is done out of this ſervice by the general right of every member of the ſtate to annoy the enemy, has no foundation in public war. For as public wars begin from the authority of the ſtate, ſo they are carryed on by its authority: every member therefore of the ſtate who acts at all in ſuch a war, acts as a part of the whole, and under the authority or in the right of the public: he is an agent for the public, or acts in the ſervice of the ſtate, whether he has received any expreſs command for what he does, or acts at his own diſcretion, as he ſees opportunity: the only difference is, that in one caſe he acts by a particular commiſſion, and in the other caſe by a general one.

Grotius allows, that the rule, which he draws from this diſtinction, admits of one exception. Whilſt he contends, that what is taken in war by any members of civ

civil ſociety, is the private property of the captors, if they were acting only by the general right of war, and not under any immediate command of the ſociety; he confines this rule to moveable goods; becauſe immoveable goods, ſuch as provinces, or towns, or whatever other things adhere to the ſoil and are parts of the territory, are not uſually taken, and cannot uſually be kept, without armies and garriſons. But if the rule itſelf was true; the reaſon, upon which he ſupports this exception, would not extend the exception univerſally to all immoveable goods, by what means ſoever ſuch goods are taken. For though it may be more difficult for private perſons to take and to keep provinces or towns, than to plunder ſome few of the inhabitants, and to ſeize their moveable goods; yet this is only a bar in fact, and not a bar in right, to the claim of private captors to what adheres to the ſoil and is a part of the enemys territory. Private perſons will more ſeldom be able to take and to keep immoveable goods, upon account of this difficulty. But if in fact they have ever overcome this difficulty, and have been able to take and to keep them without an army or a garriſon acting under the immediate and particular commiſſion of the public, they will then have a right to theſe; if in the like circumſtances, they would have any right to moveable goods.

But there is a general reaſon, why all goods, which are taken in war, ſhould accrue to the ſtate, and not to the private captors; whether the captors act under a particular commiſſion, or only under a general commiſſion, from the public; and whether the goods are moveable, or immoveable. The goods ſo taken are not ſtrictly appropriated either to the ſtate or to the pri-

vate captors, whilſt the war continues: the property in ſuch goods is precarious, till a treaty of peace has eſtabliſhed it. In the mean time, as the ſtate is anſwerable for them to the enemy, it is natural, that this precarious property ſhould be veſted in the ſtate, that is, that the ſtate ſhould have the cuſtody of the goods. And as the effect of a treaty of peace is only to give the full property of the goods to thoſe, who had the cuſtody of them before; the full property will by this means accrue in the end to the ſtate itſelf.

I have here ſpoken of the property of all goods, which are taken in war, as ultimately transferred by conſent in treaties of peace, without having any regard to what is taken for damages or for current expences. As to expences, whatever a private perſon, who is not immediately retained in the ſervice of the public, lays out in a public war, whilſt he is carrying on ſome particular deſign of his own, this is all expended voluntarily and not through the fault of the enemy: ſo that this expence gives him no private claim upon the enemys goods. The caſe of a claim to an equivalent for damages done is rather more intricate: becauſe the damages, for which a compenſation is due from the enemy, are ſometimes ſuch as have been done to the ſtate, and ſometimes ſuch as have been done to ſome particular members of it. What is taken from the enemy to make reparation for damages done to the ſtate in its corporate capacity, planely belongs to the ſtate itſelf, and not to the particular captors, who are members of the ſtate. The only doubt is about what is taken, upon account of damages, that have been done to private perſons. And here it is plane, that unleſs the captors themſelves are the perſons, to whom

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theſe damages have been done, the purpoſe, for which the goods are taken, gives the private captors no claim to them. But if the captors themſelves are the perſons, who have been injured, it will be neceſſary to conſider, whether they make reprizals by their own authority without any commiſſion either general or particular from the ſtate, or whether they act under the general commiſſion of ſolemn war, or under ſome particular commiſſion of reprizal. Where they take the goods of another nation without having any commiſſion from their own, this caſe is out of the preſent queſtion: there is, by the ſuppoſition, no public war, or no war between the two nations; becauſe, if there was, the captors would act at leaſt by the general commiſſion of war, though they had no particular commiſſion of reprizal. If they thus make reprizals at their own diſcretion, the act is their own, and they are anſwerable for the juſtice of it. For though by the ſocial compact they had a claim to be ſupported by the public in obtaining reparation of ſuch damages, as they have ſuſtained from foreigners, yet if they will undertake of their own accord to obtain it for themſelves, it is their buſineſs to ſee, that what they do is no more than natural juſtice will warrant, and to ſupport their own act, after they have done it. Since therefore they themſelves are anſwerable for what they do, in thus taking the goods of foreigners, the goods, which are ſo taken, are acquired for themſelves; and the public, as it is not concerned in the act of taking them, can have no claim to them. Where the damages, which the captors have ſuſtained, is the cauſe of a ſolemn war, the ſtate by thus undertaking to recover reparation of their damages makes itſelf anſwerable to

them

them for what they have loſt, as far as it recovers reparation. In the mean time if they act only by the general commiſſion of ſolemn war, and have no particular commiſſion to make reprizals for themſelves, they act no otherwiſe than as parts of the ſtate: and notwithſtanding the claim, which they have upon the public, what they take belongs in the firſt inſtance to the public and not to them. But if they act under a particular commiſſion from the ſtate to make reprizals for themſelves, whether the war is ſolemn or imperfectly public, they acquire property for themſelves in the goods which they take; not becauſe they are the perſons, to whom reparation is to be made; for the ſame commiſſion, if it had been given to any of the other ſubjects, would have produced the ſame effect; nor yet becauſe they are the captors; for the goods, if they had taken them in a ſolemn war, without ſuch a commiſſion, would in the firſt inſtance have accrued to the public; but becauſe the nation has conveyed to them its intereſt in what they take by the particular commiſſion, under which they act; by this commiſſion the nation makes them its agents, but the nature of the commiſſion is ſuch as makes them the nations agents for their own intereſt.

The army or the fleet of a nation is immediately employed by the public, and conſequently what either of them takes will naturally acrue to the nation. If it is otherwiſe in any nation, if the ſoldiers have in any nation a right to the plunder, or the ſeamen to the captures, which they make; this right is derived, as we have already hinted, from an occaſional grant, which the nation makes to them, or from a ſtanding

grant

grant made either by the written civil law of the nation, or by cuſtom, which is an unwritten civil law. But when a nation has expreſsly granted to its army or to its fleet property in what they take, whether the grant is made occaſionally, or made by a written civil law, if the army or the fleet ſhould take a town, or if the army ſhould over-run and ſeize a province; they would have no claim by this grant to the juriſdiction or paramount property of ſuch town or ſuch province. For the word — property — is to be conſtrued in ſuch a ſenſe as is ſuitable to the condition of the perſons, to whom it is granted. Subjects have uſually no other ſort of property beſides what conſiſts in private ownerſhip. The notion therefore of property, when it is applyed to them, does not include juriſdiction or paramount property. And conſequently whatever other property the army or the fleet might claim by means of ſuch a grant in the towns or the provinces, which they have taken; the juriſdiction or paramount property would, notwithſtanding the grant, accrue to the nation. For a like reaſon, if ſuch moveable goods, as the army or the fleet takes in war, have by cuſtom been acquired for themſelves and not for the nation; ſuch a cuſtom will give them no claim to towns or provinces, which they take: becauſe a cuſtomary claim to an inferiour kind of property does not imply a claim to juriſdiction.

It is to be obſerved, that though in treaties of peace the property of ſuch moveable goods, as have been taken from an enemy during the war, commonly paſſes by tacit conſent from the enemy to the nation, which takes them; yet this is not neceſſary. A nation in an unjuſt war has no claim to damages or to expences,

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and, even in a juſt war, it may have taken more than its damages or expences amount to. Whilſt the war continues, the nation has of right nothing but the cuſtody of the goods, which it has taken. If therefore it has granted the property of ſuch goods to the private captors, and the enemy, when he comes to make peace, ſhould inſiſt upon reſtitution of what has been taken more than is due; it might be a queſtion, whether the nation or the private captors are to make the reſtitution? In reſpect of the enemy the obligation to make reſtitution reſts upon the nation: becauſe in reſpect of him the nation is the captor, and what has paſſed between the nation and its own members does not fall under his notice. But if the grant, made by the nation to the private captors, contained a reſerve, that in caſe the enemy demands reſtitution of what they have gotten, they ſhall return it into the cuſtody of the public; they are then obliged to return it, or an equivalent for it: becauſe they have no fuller right to it, than they derive from the grant of the nation, and conſequently hold it under all ſuch reſerves, as are contained in this grant. If there is no reſerve of this ſort, the nation, though it is obliged to make reſtitution, has no other demand upon the private captors, than it has upon all its others members, to contribute towards this reſtitution. An abſolute grant of property made by the nation will bar all other demands. For though it has granted abſolute property, where it had itſelf only a precarious property, this is its own fault, and will not affect the claim of the proprietors. It would affect their claim, if they were reſponſible to the enemy: becauſe in reſpect of the enemy, the nation could not give them abſolute property, where its own property

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was precarious. But as the nation is reſponſible to the enemy, and they are reſponſible only to the nation, the grant, which the nation has made, will hold good againſt itſelf; though ſuch grant was made in its own wrong.

What prevents priſoners of war from being ſlaves.

XVII. Since all the members of a nation, againſt which a juſt war is made, are bound to repare the damages, that gave occaſion to the war, or that are done in it, and likewiſe to make ſatisfaction for the expences of carrying it on; the law of nature will allow thoſe, who are priſoners to be made ſlaves by the nation, which takes them; that ſo their labour, or the price for which they are ſold, may diſcharge theſe demands. Thus the acquiſition of priſoners of war, or rather of their perſonal labour, is made in the ſame manner and is ſubject to the ſame rules with the acquiſition of the goods of the enemy. Deſpotiſm however, when it is thus acquired, cannot include a right in the maſters or owners of ſuch priſoners of war, as are made ſlaves, to diſpoſe of their lives at pleaſure. The captors have a right to every valuable conſideration, that the priſoners can make over to them, towards reparing the public damages or returning the public expences: but the death of the ſlave, whilſt it is a loſs to him, brings no profit to the nation, that took him priſoner. And if the nation had no right to take away his life, no private owner, who claims under the nation, can have ſuch a right. [p] Grotius here follows the common opinion, that as the law of nations permits priſoners of war to be killed, ſo the ſame law has introduced a right of making them ſlaves, that the captors, in view to the benefit ariſing from the labour or the ſale of their

[p] L. III. C. VII. § V.

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priſoners, might be engaged to ſpare their lives. In this account of the means, by which priſoners of war become ſlaves, their ſlavery begins from the right, which the captors have over their lives. The reader therefore may perhaps imagine, that the ſame right continues in their maſters, after they become ſlaves. But we have already ſhewn, that the principle, upon which Grotius here ſets out is not univerſally true. A nation has not, even in a juſt war, a general right to kill the priſoners, that it takes. The only general right that it has over them, is the ſame that it has over all the members of the adverſe ſociety: thoſe members, who are taken priſoners, are bound, as all the other members are, to repare the damages, which it has ſuſtained, and to return the expences, which it has made. Where it is inconſiſtent with the ſecurity of the captors to ſave the priſoners, they may lawfully kill them. But it is impoſſible in the nature of the thing, that any queſtion ſhould ariſe, whether if any priſoners have been reſerved for ſlavery in ſuch an exigency, the right, which the captors had over their lives, whilſt they were priſoners, does not continue, after they are made ſlaves? the caſe implys, that the priſoners cannot be ſaved: for if they could be ſaved, the captors would have no right to kill them. We muſt either ſuppoſe on the one hand, that the lives of the priſoners can be ſaved, conſiſtently with the ſafety of the captors; and then the captors will have no right over their lives from the firſt, and conſequently can have no ſuch right, after they are reduced to a ſtate of ſlavery; or elſe we muſt ſuppoſe that the priſoners cannot be ſaved, conſiſtently with the ſafety of the captors; and then though the captors have a right to

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take away their lives, this right cannot continue, after ſuch priſoners are become ſlaves; becauſe they muſt all be deſtroyed, and conſequently none will be left to make ſlaves of. The caſe will be the ſame, if we ſuppoſe, that an army has taken ſo great a number of priſoners, that it cannot ſave them all conſiſtently with its own ſafety, and that it therefore kills ſome and ſaves as many as it can. We cannot aſk, whether the nation, to which the army belongs, has a right over the lives of thoſe, who are killed, when they become ſlaves? becauſe as they are killed, they never can become ſlaves: and as to the reſt, whoſe lives could be preſerved, conſiſtently with the ſafety of the army, neither the nation nor its army had from the firſt any right over their lives, and can therefore have no ſuch right after they come into a ſtate of ſlavery. If there are any particular priſoners, who have committed ſuch a perſonal crime againſt the nation, which takes them, as deſerves death, though the general offence of the ſociety, to which they belong, would give it no right to take away their lives, yet a crime of this ſort may give it ſuch a right. But if the nation inſtead of killing theſe priſoners, makes ſlaves of them; whatever right over their lives it had before, by the act of making them ſlaves it parts with this right: for by this act it conſents to take their labour in exchange for their lives.

This is the general law concerning priſoners of war. In europe indeed priſoners of war are not ſlaves. But their ſlavery is prevented by the law of each particular nation, and not by any law, which all the nations of europe have agreed to eſtabliſh amongſt themſelves, as the common rule of their conduct towards one another.

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The civil law of each particular nation does not allow of ſlavery, unleſs perhaps where a ſubject of its own has committed a crime, for which this law condemns him to labour in the mines, or in the gallies, or in the foreign plantations. And if the civil law of any nation does not allow of ſlavery; priſoners of war, who are taken by that nation, cannot be made ſlaves. There are however even in europe ſome remains of the right, which ſlavery produces over the perſons of priſoners of war. They are exempted from the labour and drudgery of ſlaves; but the nation, which takes them, conſiders itſelf as having ſome right to their perſons, and accordingly ſells their liberty at the price of a ranſom, or elſe barters them away in exchange for its own ſubjects, who have been taken priſoners in war by their nation. This right would continue even after peace is concluded between the two nations; if in the treaty of peace there was no expreſs ſtipulation for a releaſe of priſoners. But as no profit is to be had from their labour, and it would be expenſive to keep them; there is always a prudential reaſon for releaſing ſuch of them at leaſt as cannot pay their ranſom; though no compact has been made about them.

Effect of a declaration of war.

VIII. After what has been ſaid about public war, the effects of a declaration of war may be eaſily underſtood. One effect of it is merely nominal. Though every contention by force is war, and every contention of two nations by force, upon the authority of their reſpective ſupreme governours in external matters, is public war; yet in the more common language, when we are ſpeaking of the contentions of two nations, we call them reprizals or acts of hoſtility, and do not give them the name of war, unleſs war has been declared

clared. After war is declared; as we then call the contention of two nations emphatically war, ſo it is ſometimes called ſolemn and ſometimes juſt war. But this title of juſt war is merely nominal; it imports, that a war, when it is declared, is perfectly public, and not that it has any peculiar ſort of external juſtice, or that it produces any effects of right, by a purely poſitive law of nations, which other public wars will not produce, and much leſs that it is of courſe internally juſt.

The only real effect of a declaration of war is, that it makes the war a general one, or a war of one whole nation againſt another whole nation: whilſt the imperfect ſorts of war, ſuch as reprizals, or acts of hoſtility, are partial, or are confined to particular perſons, or things, or places. In a ſolemn war all the members of one nation act againſt the other under a general commiſſion; whereas in public wars, which are not ſolemn, thoſe members of one nation, who act againſt the other, act under particular commiſſions. I do not mean, that, when one nation has declared war againſt another, all the members of the former muſt neceſſarily be at liberty to act as they pleaſe againſt the latter. The nation, which has ſo declared war, has ſtill authority over its own ſubjects, and may reſtrain them from acting againſt the other nation in any other manner, than the public ſhall direct. So that, in conſequence of ſuch a reſtraint, none can act in the war, even though it has been declared, beſides thoſe, who have particular orders or commiſſions for this purpoſe. But this reſtraint, and the legal neceſſity, which follows from it, that they, who act, ſhould have particular orders or commiſſions for what they do, ariſes not from the law of nations, or from the nature of the war, but from

the civil authority of their own country. A declaration of war is in its own nature a general commiſſion to all the members of the nation, which has declared war, to act hoſtily againſt all the members of the adverſe nation. And all reſtraints, that are laid upon this general commiſſion, and make any particular orders or commiſſions neceſſary, come from poſitive and civil inſtitution.

[q] Grotius diſtinguiſhes here between what is commanded by the law of nature, what is matter of civil inſtitution, and what is required by the law of nations. The law of nature, he ſays, when it is applyed to individuals in a ſtate of nature, will allow us to make uſe of force againſt them, to puniſh them for any crimes, which they have committed, or to recover our own goods, which they have unjuſtly taken from us, or to defend ourſelves againſt any injury, which they are attempting to do us, though we give them no notice beforehand, that we will make uſe of ſuch force. But before we can juſtly ſeize upon any of their goods as an equivalent for what they have taken from us, the law of nature requires, that we ſhould make a demand of our own goods. For our primary right is a right to our own goods: the right to an equivalent is only a ſecondary one, and does not take place, till the other is finally defeated. There is a farther reaſon againſt ſeizing upon the goods of a nation or of ſome of the members of it, upon account of any damages; which we have ſuſtained from others of its members, till we have demanded of the nation to do us juſtice againſt its ſubjects. For without a refuſal to comply with ſuch a demand, the law of nature will not make the

[q] L. III. C. III. § VI. VII.

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nation a party in the offence of its members, and conſequently will not juſtify us in making war upon it. But Grotius ſeems here to confound two things, which are widely different from one another. I allow, that the law of nature requires ſuch a demand as this to be made, before it will juſtify a public war: but this is no evidence, that it likewiſe requires a declaration of war: becauſe a declaration of war is not the ſame thing with a demand to have juſtice done us, which demand is made in order to avoid a war. Theſe two acts may be done at one and the ſame time: as when we declare war conditionally, unleſs our demands are ſatisfyed: but ſtill they are different acts: the declaration of war is void, that is, the war does not take place, notwithſtanding the declaration, if the demand produces its proper effect by obtaining reparation for the damages, that we have ſuſtained. Grotius allows here, that the law of nature does not require a declaration of war to be made in order to prevent all appearance of deceit or of clandeſtine management, and to give the adverſe nation an opportunity of being upon its guard. This is not matter of ſtrict right, however it may be matter of bravery or of what goes under the notion of honour: as ſome nations have, upon the ſame principle, given notice to the enemy beforehand of the day and place of battle.

The formalities of declaring war belong to the civil law: each nation determines for itſelf by what officers, in what places, and with what ceremonies, a declaration of war ſhall be made.

Grotius derives the principal obligation to declare war from a purely poſitive law of nations. This obligation, as he explanes it, is derived from an external

purpoſe and not from any internal reaſon of natural juſtice. A war, he ſays, unleſs it is declared, does not give impunity to the parties concerned in it, and does not give one of the parties property in what it takes from the other. But if by the parties concerned in the war we mean the nations; neither the reaſon of the thing nor the common practice of nations will give them any other impunity, or allow them any otherwiſe to obtain property in what is taken, where war has been declared, than in the leſs ſolemn kinds of public war, which are made without a previous declaration. Indeed in ſolemn war the individual members of a nation, which has declared war, are not puniſhable by the adverſe nation for what they do: becauſe the guilt of their actions is chargeable upon the nation, which directs and authorizes them to act. But even this effect may be produced, though not in reſpect of all the members of the nation, yet in reſpect of ſome of them, without a declaration of war. For in the leſs ſolemn kinds of war, what the members do, who act under the particular direction and authority of their nation, is by the law of nations no perſonal crime in them: they cannot therefore be puniſhed conſiſtently with this law for any act, in which it conſiders them only as the inſtruments, and the nation as the agent.

Law of nations in reſpect of ſtates that are neutral in a war.

XIX. When two or more nations are at war with one another, the principal queſtions relating to neutral ſtates, that is, to ſuch ſtates as are not parties in the war, are; [r] firſt, what theſe neutral ſtates may do in reſpect of either of the nations, which are at war, without departing from their neutrality; and ſecondly,

[r] Grot. L. III. C. XVII. §I. III.

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what conduct is allowable in the nations, which are at war, towards the neutral ſtates.

The general rule in the firſt of theſe queſtions is, that a neutral ſtate is not at liberty to give any aſſiſtance to either of the ſtates, that are at war. This rule, when it is thus generally expreſſed, is not ſo to be underſtood, as if it was naturally unjuſt for a ſtate, which is for ſome time neutral in a war, to joyn itſelf in the progreſs of the war to one of the contending parties. When we ſay in general, that a neutral ſtate is not at liberty to aſſiſt either party; we only mean, that it cannot aſſiſt either conſiſtently with its neutrality. But if we diſtinguiſh the notion of neutrality into general and particular; the rule in a particular neutrality will bear, or rather will require, a different conſtruction. The neutrality of a nation is general, where it is not in fact a party in a war. The neutrality is particular, where the nation has bound itſelf by compact to one or both the contending nations not to make itſelf a party. If the neutrality is only general; it is only inconſiſtent with ſuch neutrality to give aſſiſtance to either of the contending nations; that is, the ſtate, by giving its aſſiſtance to either of them, ceaſes to be a neutral ſtate, and may be treated by the other of them as a party in the war. If the neutrality is particular, and a compact of neutrality has been made with both; it will then be a breach of compact and conſequently an injury againſt one of them, to give aſſiſtance to the other. Or if the compact is made with only one of them, the giving of ſuch aſſiſtance to the other will be a breach of this compact: but to aſſiſt the nation, with which this compact is made, will only be a ſimple breach of neutrality in reſpect of the other.

The reaſon of this rule ariſes out of the nature of things, and ſhews it to be a rule of the law of nature, which may be applyed alike either to individual perſons in a ſtate of equality or to the collective perſons of civil ſocieties. For the notion of neutrality in a war, whether the war is private or public, conſiſts in avoiding to take part with either of the perſons, who are engaged in it. But to give aſſiſtance to one of them is to take part with that perſon, to whom ſuch aſſiſtance is given, and conſequently is inconſiſtent with the notion of neutrality.

The neutrality of a ſtate abridges its liberty of trading with either of the contending nations, but does not wholly deſtroy this liberty. [9] Nothing is inconſiſtent with the notion of its neutrality, beſides aſſiſting one of them in the war. It may therefore ſupply either of them with all goods, as if they were at peace with one another, except ſuch goods, as will help the party, that is ſupplyed with them, to carry on the war more effectually. Goods of this ſort are called contraband. This word is ſometimes uſed in another ſenſe, and means all ſuch goods, as a nation will not allow to be exported out of its territories or be imported into them. But this is not the ſenſe, in which it is commonly uſed in the queſtion, that is now before us. The notion of contraband goods is of ſome latitude: ſo that it is not eaſy preciſely to determine, what are, and what are not, of this ſort. All warlike ſtores are undoubtedly contraband. But ſtill the queſtion returns, what are to be reckoned warlike ſtores? Grotius has removed ſome of the uncertainty in this queſtion by dividing goods into three ſorts. Some goods have no

[9] Grot. L. III. C. I. § V.

uſe,

uſe, except in war, ſuch as arms and ammunition. Some are of no uſe at all in war, and ſerve merely for pleaſure. And ſome are of uſe either for the purpoſes of war, or for other purpoſes; ſuch as money, proviſions, ſhips, and the materials for the building, fitting out, or reparing, of ſhips. The firſt ſort is planely contraband: and the ſecond ſort is planely not ſo. In the third ſort, in order to determine, whether they are contraband or not, we muſt conſider the condition, and circumſtances of the war. Where a war is carryed on by ſea as well as by land, not only ſhips of war, which are already built, but the materials for building or reparing of ſhips, will come under the notion of warlike ſtores. It may be ſaid indeed, that timber or cordage may be uſed for other purpoſes, beſides the building or fitting out of ſhips, or that it may be uſed for the building and fitting out of other ſhips, which are not ſhips of war. But this will be of no great weight: for the ſame might be ſaid of horſes or ſaddles, or many other things, which are commonly reckoned amongſt warlike ſtores: they are capable of being employed for other purpoſes; the uſes of them are not neceſſarily confined to the purpoſes of war. But as arms or ammunition are warlike ſtores in their own nature, ſo timber, or cordage, as well as horſes, or ſaddles, may in all reaſon be reckoned warlike ſtores; when from comparing the ſorts or the quantities of them with the condition and circumſtances of the war, it appears, if not to be impoſſible, yet at leaſt to be in the higheſt degree unlikely, that they ſhould be deſigned for any other purpoſes beſides the purpoſes of war. Even common proviſions for the ſupport of life will come under the notion of war-

like ſtores, when they are going to a place, which is beſieged or blockaded. They are not indeed ſuch weapons, as will annoy an enemy in war; but they are ſuch ſtores, as will help the nation, to which they are carryed, to make its defence in war more effectually, than it could have been done without them, when one of its towns is beſieged or blockaded.

Sometimes to remove all poſſibility of doubt about what goods are contraband, a nation, that is at war, enumerates them particularly in treaties or compacts with neutral ſtates: and ſuch treaties leave the neutral ſtates, with which they are made, at liberty to ſupply the enemy with all goods, that are not enumerated in them. But theſe treaties do not operate as a law and determine what ſhall and what ſhall not be reckoned contraband amongſt all nations whatſoever: they are in this reſpect like all other treaties, and are binding only between the nations, that are parties to them.

[t] Grotius himſelf confeſſes, that he was forced to examine this queſtion by the law of nature; becauſe he could find no evidence of a purely poſitive law of nations. But the law of nature, when it is thus applyed to the collective body of nations, though our author does not call it the law of nations, is what we have hitherto called by this name, and is the only law of nations, that has any real foundation.

When contraband goods are carryed to our enemy by a neutral ſtate, which either did know, or might have known, that the aſſiſtance, which it thus gives to our enemy, will hinder the execution of our right; as this neutral ſtate does us damage, it is obliged, in the opinion of [u] Grotius, to make us amends; and if ſuch

[t] Ibid. [u] Ibid.

amends

amends is refuſed, we may juſtly make reprizals upon it to the amount of the damage. But here he ſuppoſes the contraband goods to have been delivered, and ſome actual damage to have been done. For if the neutral ſtate has not done any actual damage, but only deſigned to do it, he does not allow us a right of reprizal, or even a right to take the contraband goods to our own uſe, unleſs we take them upon the claim of neceſſity; that is, unleſs the exigency of affairs is ſuch, that we cannot poſſibly do without them. All that he allows us to do, when we are not preſſed by ſuch a neceſſity as this, is to compel the neutral ſtate to give us ſecurity by hoſtages, or pledges, or ſome other means, that it will not attempt any thing of the like ſort for the future. If indeed the neutral ſtate not only does a ſimple injury, but appears planely to have had a malicious deſign of hurting us by confirming and aſſiſting our enemy in an unjuſt war againſt us; this, ſays Grotius, is a criminal act; and as we may puniſh it for ſuch an act in ſome other way; ſo likewiſe we may puniſh it by deprivation of goods, and particularly by ſeizing the contraband goods, which it was carrying to the enemy. But there is a reaſon, which our author does not take notice of, why we may, conſiſtently with the law of nature, ſeize upon the contraband goods of a neutral ſtate, which it is carrying to the enemy, as if they were the goods of an enemy, without conſidering this act as a crime, for which we may puniſh thoſe, who are guilty of it, by depriving them of their goods. If we meet with the contraband goods in their paſſage, and prevent the delivery of them to the enemy; there is certainly no actual damage done to us by the neutral ſtate, from which they came: there is only a deſign

of

of doing us damage. And this deſign, if it is conſidered ſeparately from its circumſtances, will give us only a right of guarding againſt it, or perhaps of taking ſome ſecurity againſt any future attempt of the ſame ſort. But the firſt inſtance of ſuch an attempt is a breach of neutrality: a neutral ſtate by ſending contraband goods to our enemy, whether it delivers them or not, makes itſelf ſo far at leaſt an acceſſory to the war, as it would have given aſſiſtance to our enemy, if we had not prevented it. We cannot indeed treat it as a principal in the war, where it does not aſſiſt the enemy with its whole force. But as far as it is an acceſſory to the war we may treat it as an enemy, and conſequently may ſeize the contraband goods, as if they had belonged to an enemy. The injury, which the neutral ſtate attempts, as it is not completed, produces no claim to reparation of damages: but the attempt itſelf makes the neutral ſtate an acceſſory to the injuries, which we have received from the enemy: and thus the neutral ſtate, by communicating in the injuſtice of the enemy, gives us a right to demand reparation of damages, as far as it has communicated in this injuſtice.

Under the ſecond queſtion relating to neutral ſtates, [v] Grotius takes no particular notice of any thing, which may be done againſt them by a nation, that is at war, except what it is compelled to do by abſolute and unavoidable neceſſity. If it has any right at all to ſeize upon any neutral towns, and to put garriſons into them to prevent them from falling into the enemys hands, this right can ariſe from nothing but the extreme danger, which it would be in, if the enemy ſhould get poſſeſſion of them, and the plane evidence, that the

[v] L. III. C. XVII. § I.

enemy

enemy has a deſign to ſeize them, and would otherwiſe ſucceed in ſuch a deſign. And even this right of neceſſity is ſubject to many reſtrictions. When we ſeize a town upon this pretence, we can only take the cuſtody of it, and have no right to any juriſdiction over it: becauſe whatever the cuſtody of the town may be, the juriſdiction over it cannot be neceſſary for our ſecurity. Whatever damages the nation, to which the town belongs, may ſuffer either upon account of our having the cuſtody of it, or by our means, whilſt it is in our hands, we are obliged to make reparation for them. And as ſoon as the neceſſity, with which we were preſſed, is over, we are obliged to withdraw our garriſon, and to give up the place into the hands of the nation, to which it belongs. But theſe are not the only reſtrictions of this right: there is another, which renders it ſo precarious in the exerciſe, as to be little better than no right at all. We cannot be juſtifyed even by neceſſity in ſeizing it, if the neutral ſtate, to which it belongs, is preſſed by an equal neceſſity. And ſince this ſtate may reaſonably apprehend itſelf to be in danger of being treated by the enemy as an acceſſory to our act of ſeizing the town, it has an equitable claim to judge of its own neceſſity: and conſequently our claim of neceſſity can ſcarce take place conſiſtently with juſtice, unleſs we have firſt obtained the conſent of the ſtate.

We have a right in war to take the goods of the enemy. But this right is reſtrained to ſuch goods as are either in our own territory, or in the territory of the enemy, or in places, which are not parts of the territory of any ſtate. For if the goods of an enemy are in the territory of a neutral ſtate; ſince we have no right to go thither in a hoſtile manner; they are under the

the protection of the ſtate, and the law of nations will not allow us to take them. [w] In like manner we have no right to take them, if they are on board a ſhip, whilſt the ſhip is in a neutral port; whether the ſhip itſelf is a neutral one, or belongs to the enemy; becauſe the port is a part of the territory of the neutral ſtate. When the goods of an enemy are on board the ſhip of an enemy, and the ſhip is in the main ocean, there can be no doubt about our right of taking both the goods and the ſhip: becauſe they are then in a place, which is not in the territory of any nation. But when the goods of an enemy are on board a neutral ſhip, and the ſhip is in the main ocean; though we have a right to take the goods, we have no right to take the ſhip, or to detain it any longer, than is neceſſary to obtain poſſeſſion of the goods. For the ocean itſelf is no territory: and neutral ſhips, as they are moveable goods, are not parts of the neutral territory. As long as the ſhips continue in their own ports, the goods, which are on board them, as well as the ſhips themſelves, are within the neutral territory, and cannot be taken. But as ſoon as the ſhips come into the main ocean, the goods, which are on board them, are in no territory, and conſequently are no more under the protection of the neutral ſtate, than the ſame goods would be, if they were paſſing through an uninhabited country, where no nation has juriſdiction, in neutral carriages or on neutral horſes. A neutral ſhip may indeed be called a neutral place: but when we call it ſo, the word—place—does not mean territory; it only means the thing, in which the goods are contained: and as this is a moveable thing, it is no part of the territory, and is no longer

[w] Grot. L. III. C. I. § V. Not.

under

under the juriſdiction of the nation, than it continues within the territory. Though the goods of the enemy had been on board a ſhip belonging to the enemy, we might have ſaid in the ſame ſenſe, that they were in a neutral place, if they had been locked up there in a neutral cheſt. But no one would imagine, that ſuch a neutral place, as a cheſt, can be conſidered as a part of the territory of the neutral ſtate, or that it could protect the goods; notwithſtanding a neutral cheſt is as much a neutral place, as a neutral ſhip. The juriſdiction of a nation over things is confined to that tract of land, upon which it is ſettled, and to ſuch waters as are appendages to that land. Theſe immoveable things, which are called the territory of a nation, are the immediate objects of juriſdiction or paramount property. Moveable things are the proper objects of inferiour property, or private ownerſhip, and are no otherwiſe the objects of juriſdiction, than as they happen to be within the territory. Thus a ſhip, though it is a moveable thing, is under the juriſdiction of a nation, whilſt it continues in one of its ports. But as ſoon as it is out at ſea, only the private ownerſhip or inferiour property of the ſhip continues: it ceaſes to be under the nations juriſdiction. The caſe will be the ſame, if inſtead of ſuppoſing the ſhip to be the property of a private merchant, we ſuppoſe it to be the property of the nation. For though we cannot well call the property, which the nation has in ſuch a ſhip, by the name of private ownerſhip; yet when the ſhip comes into the main ocean, the juriſdiction or paramount property of the nation ceaſes; and the right, that remains, is an inferiour kind of property, which has the nature of private ownerſhip. But if the juriſdiction, which a neutral

tral ſtate has over the ſhips of its members, or even over its own ſhips, ceaſes, when the ſhips are out at ſea; the goods of an enemy, that are on board ſuch ſhips, cannot be under the protection of the nation in the ſame manner, as if the ſhips had been in one of its ports, or as if the goods had been on its land.

Notwithſtanding a ſhip, when it is in the main ocean, is no part of the territory of a nation, and conſequently is not ſubject to the juriſdiction, which the nation has over things; yet the men, who are in it, as they are members of the nation, are ſtill ſubject to the juriſdiction, which it has immediately over the perſons of its members. It is proper to take notice of this juriſdiction, though it is not material to the preſent queſtion: becauſe otherwiſe, when I ſay, that the juriſdiction of a nation over its own ſhips or the ſhips of its members ceaſes, as ſoon as they are in the main ocean, the reader might have imagined, that I ſuppoſe the whole juriſdiction of the nation to ceaſe, its juriſdiction as well over the perſons, who are in the ſhips, as over the ſhips themſelves. When the ſeamen are on land, or in port, the nation has an immediate juriſdiction over them, as they are members of it, and a mediate juriſdiction over them, as they are perſons within its territory. But when they are out at ſea, though in one of its own ſhips, only the former ſort of juriſdiction remains, and the latter ſort ceaſes.

In ſome nations, cauſes which ariſe at ſea and have no connection with the land, whether they are civil or criminal, are cognizable by particular courts of marine or admiralty, which do not make uſe of the ſame forms, that are uſed in other courts of the ſame nation, and do not proceed upon what is called the law of the land,

or

or of the territory. It is plane, that, in the opinion of any nation, where ſuch courts are eſtabliſhed, a ſhip, when it is out at ſea, is no part of its territory: for if it was, though there might be a diſtinction of courts, there could be no reaſon, why the courts, which have cognizance of ſuch cauſes as ariſe at ſea, ſhould decide according to any other law than what is the general law of the land in all cauſes, which are in every reſpect the ſame, except only, that they ariſe on the land or are connected with it.

Though a neutral nation, when its ſhip is in the main ocean, has no ſuch juriſdiction over the ſhip itſelf, as if it was a part of its territory, yet either the nation itſelf, or ſome of the members of the nation, which is the ſame thing in the view of the law of nations, will continue to have an inferiour ſort of property or ownerſhip in it. And this inferiour property or ownerſhip will render it unjuſt in us to take the ſhip, notwithſtanding we may lawfully take any goods of the enemy, which are on board.

But here a difficulty offers itſelf, which muſt not be overlooked. That inferiour kind of property, which we have called private ownerſhip to diſtinguiſh it from a juriſdiction over things, is an excluſive right: thoſe perſons, who have ſuch ownerſhip in things, whether they are private or public perſons, have a right to exclude all other perſons from making uſe of theſe things. [x] By this means the rights of others are frequently hindered from taking effect. Wild beaſts, and birds, and fiſhes, are, till they are catched, in common to all mankind; and I have a right with the reſt of mankind to catch them, and to make them my own

[x] See B. I. C. V. § V.

by

by catching them. But I cannot hunt or ſhoot or fiſh without uſing the ſoil or the water of another man. And as I have no right to uſe theſe without his conſent; he may juſtly hinder me from doing any of theſe acts, as far as his right of property extends. Thus therefore by his private ownerſhip I am hindered from taking ſuch things, as I ſhould otherwiſe have a right to take, if they did not happen to be in ſuch places, as he has an excluſive right to. In like manner, though we have a general right to take the goods of an enemy, when they are out at ſea, yet there is ſome reaſon to doubt, whether the effect of this right may not be hindered by the inferiour property or ownerſhip, which a neutral nation has in the ſhip, where the goods are. For it may be ſaid, that, notwithſtanding our general right to take the goods, the neutral nation conſidered merely as a private owner has an excluſive right to its own ſhip, and conſequently may hinder us from coming into the ſhip to take the goods. Thoſe, who ſet up a purely poſitive law of nations, have nothing elſe to do here in anſwer to this difficulty, but to prove the exiſtence of ſuch a law, and to ſhew that this law has in fact determined otherwiſe. But if the law of nations is nothing elſe but the law of nature applyed to the collective perſons of civil ſocieties; inſtead of anſwering, that the law of nations has determined otherwiſe, we muſt find out a natural reaſon, why it ſhould determine otherwiſe. Where I have merely a right to acquire property in a thing, which is in common to all mankind, but cannot acquire property in it without the uſe of what is already the property of ſome other man; this man neither does me an injury, nor encourages or protects others, who have injured me, by

by excluding me from the uſe of what belongs to him. And thus my right of acquiring things, which are in common, will by his means fail of producing its effect: whilſt he, by whoſe means it ſo fails, will be chargeable with no crime, or no fault; becauſe he has done nothing more, than his property in what I wanted to uſe, will juſtify him in doing. But where we have a right in war upon account of the damage, which the enemy has done us, to take the goods of the enemy, and theſe goods are in a neutral ſhip; if the neutral ſtate, though it has property in the ſhip, ſhould make uſe of its right of property to protect the goods againſt us; this protection makes it an acceſſory to the injury, which gave us a claim upon the enemy to obtain reparation of damages, and conſequently is inconſiſtent with the notion of neutrality. But whilſt this anſwer removes one difficulty, it brings on another. If a neutral nation makes itſelf an acceſſory to the damages, that the enemy has done, by protecting ſuch goods of the enemy, as we have a right to take for reparation, when theſe goods are out at ſea in one of its ſhips; why might the ſame nation, without making itſelf an acceſſory to thoſe damages, protect the ſame goods, when the ſhip is in one of its ports, or when the goods are on land within its territory? A law of nations, which is natural as to the matter of it, and poſitive only as to the objects of it, will furniſh us with an anſwer to this queſtion. Every ſtate has by the law of nations an excluſive juriſdiction over its own territory. As long therefore as a ſtate keeps within its own territory, and exerciſes its juriſdiction there, we have by this law no right to take notice of what it does; unleſs indeed where by protecting ſome perſon, who has committed a crime in

our territory, it infringes upon our juriſdiction. But when its ſhips are in the main ocean; as they are then in a place out of its territory, where by the law of nations it has no juriſdiction; this law will allow us to take notice of the protection, which it gives to the goods of the enemy, and to conſider it as an acceſſory to the damages done by the enemy, if it gives them protection.

The goods belonging to a neutral ſtate or to any of its members cannot lawfully be taken, when they are on board the ſhip of an enemy. The neutral ſtate has indeed no juriſdiction in the ocean, where the ſhip is; but it has property in the goods: and as the law of nature will not allow us, ſo there is no purely poſitive law of nations that will warrant us, to violate this right of property. In the mean time the neutral goods will not ſecure the ſhip itſelf. For the ſhip is neither the property of the neutral ſtate nor within its juriſdiction.

Since the members of a nation, which is engaged in a war, whether they act under particular commiſſions, or under the general commiſſion of public war, may take the goods of the enemy, but cannot lawfully take any goods or ſhips, which are the property of a neutral ſtate, unleſs the goods are contraband; who ſhall be the judge in theſe two queſtions, that is, who ſhall determine, whether the goods or ſhips, which the members of ſuch a nation have ſeized upon and gotten into their poſſeſſion, are the property of the neutral ſtate; and if they are its property, who ſhall determine, whether they are contraband? Other neutral ſtates, which have no intereſt in the goods or ſhips, might be unprejudiced judges: but the law of nations has not made them

them authentic judges. All nations are in reſpect of one another in a ſtate of nature or of equality: no one nation has juriſdiction over the reſt, and no number of nations has juriſdiction over any one. The ſame reaſon, which excludes all other nations from having juriſdiction in theſe queſtions, will exclude both the neutral nation, whoſe members claim property in the goods or the ſhips, and likewiſe the nation, whoſe members have them in their poſſeſſion, and claim them by the right of war. Theſe two nations are in reſpect of one another in a ſtate of equality; and neither of them has any authority over the other. The juriſdiction, which the neutral nation has over things, will not extend to the things in queſtion: becauſe they are not within its own territory. And its juriſdiction over the perſons of its own members will here give it no judicial authority: becauſe in theſe queſtions its own members are the parties only on one ſide: the members of the other nation are the parties on the other ſide; and the neutral ſtate has no juriſdiction over their perſons. In reſpect of theſe reaſons, which exclude the juriſdiction of the neutral ſtate, there is no material difference between that and the other, to which the captors belong. The things in queſtion will indeed be within the territory of the latter, if the captors have brought the ſhips into their own ports. But the controverſy aroſe upon the main ocean, which is out of its territory: and as it had no juriſdiction in the firſt inſtance, the ſubſequent act of bringing the things into its territory will not give it juriſdiction. If any ſubſequent act can give it juriſdiction, it muſt be a ſubſequent conſent of the parties. The foreigners, who claim the goods or ſhips, may agree with the captors to have their reſpective claims deci-

ded by the ſtate, to which the latter belong. And ſuch an agreement will bind them to ſubmit to the ſentence of this ſtate. But if the things were brought by force into the ports of the ſtate, to which the captors belong; this act of force can produce no effects of right; till it appears whether the force is lawful or not; that is, till it appears, whether the goods might lawfully be taken or not: and conſequently this act can produce no juriſdiction in the ſtate to determine, whether they might lawfully be taken. Till the force is determined to be lawful, it gives the ſtate no juriſdiction; where it had none before. But the force cannot be determined to be lawful, till there is a definitive ſentence, that the things, which are in the poſſeſſion of the captors, might lawfully be taken. The ſtate therefore cannot have juriſdiction by means of this force, till the queſtion, in which the juriſdiction, that we are enquiring after, is wanted, has been determined.

In the uſual practice of nations, the ſtate, to which the captors belong, decides whether ſhips or goods, which are ſeized upon in war, are the property of a neutral ſtate or of an enemy, and whether the goods, if they are the property of a neutral ſtate, are contraband or not. But ſince the law of nature does not give it any authority in theſe queſtions, which can properly be called juriſdiction; it will be neceſſary, if there is no purely poſitive law of nations, that has given it ſuch juriſdiction, to enquire upon what natural reaſons its right to decide about them is founded, and what ſort of a right this is. The ſtate, to which the captors belong, has a right to inſpect into their behaviour; both becauſe they are members of it, and becauſe it is anſwerable to all other ſtates for what they do in war; ſince

ſince what they do in war, is done either under its general or under its ſpecial commiſſion. The captors therefore are obliged upon account of the juriſdiction, which the ſtate has over their perſons, to bring ſuch ſhips or goods, as they ſeize in the main ocean, into their own ports: and they cannot acquire property in them, till the ſtate has determined, whether they were lawfully taken or not. This right, which their own ſtate has to determine this matter, is ſo far an excluſive one, that no other ſtate can claim to judge of their behaviour, till it has been thoroughly examined into by their own: both becauſe no other ſtate has juriſdiction over their perſons; and likewiſe becauſe no other ſtate is anſwerable for what they do. But the ſtate, to which the captors belong, whilſt it is thus examining into the behaviour of its own members, and deciding whether the ſhips or goods, which they have ſeized upon, are lawfully taken or not, is determining a controverſy between its own members and the foreigners, who claim the ſhips, or the goods: and this controverſy did not ariſe within its own territory, but in the main ocean. The right therefore, which it exerciſes, is not civil juriſdiction; and the civil law, which is peculiar to its own territory, is not the law, by which it ought to proceed. Neither the place where the controverſy aroſe, nor the parties, who are concerned in it, are ſubject to this law. The only law, by which this controverſy can be determined, is the law of nature applyed to the collective bodies of civil ſocieties, that is, the law of nations. Unleſs indeed there have been any particular treaties made between the two ſtates, to which the captors and the other claimants belong. They may have mutually bound themſelves by particular treaties

to depart from ſuch rights, as the law of nations would otherwiſe have ſupported: goods, which would naturally have been contraband, may by expreſs treaty be made free; and on the other hand goods, which would naturally have been free, may be made contraband: neutral goods, which are on board the ſhip of an enemy, may by expreſs treaty be made lawful prize, though by the law of nature they would have been free; and the goods of an enemy on board a neutral ſhip may be made free, though by the law of nature they would have been lawful prize. Where ſuch treaties have been made, they are a law to the two ſtates, as far as they extend, and to all the members of them, in their intercourſe with one another. The ſtate therefore, to which the captors belong, in determining what might or what might not be lawfully taken, is to judge by theſe particular treaties and by the law of nations taken together.

This right of the ſtate, to which the captors belong, to judge excluſively, is not a complete juriſdiction. The captors, who are its own members, are bound to ſubmit to its ſentence; though this ſentence ſhould happen to be erroneous: becauſe it has a complete juriſdiction over their perſons. But the other parties in the controverſy, as they are members of another ſtate, are only bound to ſubmit to its ſentence as far as this ſentence is agreeable to the law of nations or to particular treaties: becauſe it has no juriſdiction over them, in reſpect either of their perſons, or of the things, that are the ſubject of the controverſy. If juſtice therefore is not done them, they may apply to their own ſtate for a remedy, which may, conſiſtently with the law of nations, give them a remedy either by ſolemn war or by re-

reprizals. In order to determine when their right to apply to their own ſtate begins, we muſt enquire, when the excluſive right of the other ſtate to judge in this controverſy ends. As this excluſive right is nothing elſe but the right of the ſtate, to which the captors belong, to examine into the conduct of its own members, before it becomes anſwerable for what they have done; ſuch excluſive right cannot end, till their conduct has been throughly examined: natural equity will not allow, that the ſtate ſhould be anſwerable for their acts, till thoſe acts are examined by all the ways, which the ſtate has appointed for this purpoſe. Since therefore it is uſual in maritime countries to eſtabliſh not only inferiour courts of marine to judge what is and what is not lawful prize, but likewiſe ſuperiour courts of review, to which the parties may appeal, if they think themſelves aggrieved by the inferiour courts; the ſubjects of a neutral ſtate can have no right to apply to their own ſtate for a remedy againſt an erroneous ſentence of an inferiour court, till they have appealed to the ſuperiour court, or to the ſeveral ſuperiour courts, if there are more courts of this ſort than one, and till the ſentence has been confirmed in all of them. For theſe courts are ſo many means appointed by the ſtate, to which the captors belong, to examine into their conduct: and till their conduct has been examined by all theſe means, the ſtates excluſive right of judging continues. After the ſentence of the inferiour courts has been thus confirmed, the foreign claimants may apply to their own ſtate for a remedy, if they think themſelves aggrieved: but the law of nations will not entitle them to a remedy, unleſs they have been actually aggrieved. And even if upon

their own report they appear in the judgment of their own ſtate to have been actually aggrieved; yet this will not juſtify it in declaring war or in making repriſals immediately. When the matter is carryed thus far, the two ſtates become the parties in the controverſy. And ſince the law of nature, whether it is applyed to individuals or to civil ſocieties, abhors the uſe of force, till force becomes neceſſary; the ſupreme governours of the neutral ſtate, before they proceed to ſolemn war or to reprizals, ought to apply to the ſupreme governours of the other ſtate, both to ſatisfy themſelves, that they have been rightly informed, and likewiſe to try, whether the controverſy cannot be adjuſted by more gentle methods.

Privileges of ambaſſadors how far natural.

XX. [y] Though Grotius refers the privileges of ambaſſadors to a purely poſitive law of nations; yet after any perſon, who is ſent from a foreign nation in the character of an ambaſſador, is received in that character by the nation, to which he is ſent; the ſeveral privileges, that Grotius mentions, will ariſe out of the law of nature applyed to the collective perſons of civil ſocieties.

The law of nature does not give any one nation a ſtrict right to demand, that any other nations ſhall receive ambaſſadors from it. This is no otherwiſe enjoyned, than as a matter of mutual convenience, or at the moſt of friendſhip or kindneſs. An intercourſe of good offices is due to mankind in general, and particularly to all, who have not deſerved to be treated as enemies. And this intercourſe is kept up and carryed on amongſt nations by means of ambaſſadors, that is, of perſons, who are ſent from one nation to another to

[y] L.II. C.VIII. §I. III.

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tranſact buſineſs between them. Sometimes they are thus ſent to procure peace, where the two nations are at war, or to maintain peace, by adjuſting ſuch controverſies as are ariſing between them, and might otherwiſe be occaſions of war. Sometimes their buſineſs is to form an alliance between the nations for their mutual defence, or to eſtabliſh other treaties, which tend to advance their mutual intereſt. It would be unkind and unfriendly, as well as imprudent, to refuſe them admittance, when they come for ſuch purpoſes as theſe. But ſince the rights ariſing out of thoſe affirmative precepts of the law of nature, which relate to benevolence, are of the imperfect ſort; if a nation ſhould refuſe to receive ambaſſadors, who are ſent to it, this cannot properly be called an injury to the nation, which ſends them. There may be ſuch reaſons againſt receiving them, as will vindicate it even from the charge of being unkind or unfriendly. [z] Grotius reduces theſe reaſons to three general heads. Firſt, there may be reaſons ariſing from the nation, which ſends them. A nation, which has broken friendſhip with us by acts of hoſtility, can have no pretence to charge us with being unkind or unfriendly, if we refuſe to receive ambaſſadors from it; unleſs they come with propoſals of amends. If it has been the practice of a nation to make uſe of its ambaſſadors to ſpirit up our people to rebellion, or to ſeduce away our manufacturers and artificers; the duty of benevolence does not require us to run the hazard of being treated in the ſame manner again. Secondly; ſufficient reaſons againſt receiving an ambaſſador may ariſe from the particular character or circumſtances of the perſon,

[z] Ibid.

who

who is ſent. If he is of a profligate character; if he has formerly behaved perfidiouſly towards us, or can juſtly be charged with having been guilty of any open affronts or inſults towards our country in general, or towards the conſtitutional governours of it in particular; however unfriendly it might be not to receive any ambaſſador from the nation, to which he belongs, there can be no unfriendlineſs in not conſenting to receive him in this capacity. Thirdly; the buſineſs, about which a nation is deſirous of ſending an ambaſſador, may be a reaſon, why he ſhould not be received. For certainly if we know beforehand what inſtructions he is charged with and what buſineſs he comes about, there is no more unkindneſs in refuſing to treat about it at all, than in rejecting his propoſals after they are made. Grotius informs his readers, that he is here ſpeaking of ſuch, as are called extraordinary ambaſſadors, who come charged with ſome particular negotiation: for as to ordinary ambaſſadors, that are ſent from any nation to attend conſtantly upon the courts of another nation, not to carry on any particular purpoſe, but to manage its buſineſs generally in thoſe courts, and to obſerve what paſſes there; the practice of the antients, who knew of no ſuch officers, has ſufficiently ſhewn us, that they are not neceſſary: and conſequently there is no great occaſion for being very ſcrupulous about refuſing admittance to ambaſſadors of this ſort.

[a] Our authors opinion about the perſonal privileges of ambaſſadors is, that whilſt all other perſons, who reſide in the territory of any nation, are ſubject, during the time of their reſidence there; to the laws of that

[a] Ibid. § IV.

terri-

territory, all nations have by poſitive agreement made an exception in favour of ambaſſadors; that as by one fiction of poſitive law an ambaſſador is conſidered as the repreſentative of the nation, which ſends him, ſo by another like fiction of the ſame law he is conſidered as if he was out of the territory, though he is in it. But there is no occaſion to have recourſe here to any fictions of a purely poſitive law of nations. An ambaſſador, who is appointed by a nation to act for it, is made the repreſentative of the nation, as far as his commiſſion extends, by the ſame law, which would make any one individual in a ſtate of equality the repreſentative of any other individual, who had appointed him to act in his ſtead. All, that can be called poſitive in this whole matter, beſides the appointment of an ambaſſador to be the agent of the nation, from which he comes, is the general conſent of mankind to conſider the collective body of every ſtate as a moral perſon. For in conſequence of this poſitive conſent, every ſtate will naturally be capable of appointing a proxy to act for it: and as the agent or proxy of an individual perſon, in the liberty of nature, is the repreſentative of that individual by the law of nature; ſo the ambaſſador, proxy, or agent of a nation is the repreſentative of that nation by the ſame law of nature, when this law is applyed by poſitive conſent to the collective perſons of civil ſocieties. Such a law of nations as this, if we look no farther, will indeed ſubject every member of one nation, who reſides in the territory of another, to the civil law of this territory, as long as he reſides there. But if we attend to the act of the nation, which ſends an ambaſſador, and to the act of the nation, which receives him in this character, we ſhall find

find, that there is a tacit compact between them, which produces an exception from this general rule in favour of ambaſſadors, without the aid of any purely poſitive law; in the ſame manner, as a compact between two individuals will in reſpect of the contracting parties produce ſuch mutual rights and obligations, as would not have ſubſiſted by the mere law of nature. When a nation ſends an ambaſſador, the meaning of this act is, that it ſends one of it own members into the territory of another nation to reſide there as its own member and to tranſact ſuch buſineſs for it, as it wants to have done there. And the nation, which conſents to receive an ambaſſador, conſents to receive him upon the ſame terms and in the ſame character, in which the other ſends him. This act therefore, of ſending the ambaſſadour on one part and of receiving him on the other part, amounts to a tacit compact between the two nations, that he ſhall be conſidered in the territory of the nation, which receives him, as a member of the nation, which ſends him. But if, whilſt he reſides in the territory of a foreign nation, he is conſidered as a member of his own; he muſt be exempted from the juriſdiction of that territory in the ſame manner as he would be exempted from it, if he had been at home: becauſe if the nation, where he reſides, claims any juriſdiction over him, it treats him as one of its one members, and not as a member of the nation, from which he comes.

The general conſequence from theſe principles is, that an ambaſſador, when he commits any crime, cannot be puniſhed for it by the nation, where he reſides, when he commits it. This nation is bound to treat him in all reſpects, as if he was reſident in his own country. But if he had been reſident there, it would

would have had no juriſdiction over him. He can therefore be proceeded againſt no otherwiſe, than by a complaint to his own nation, which will make itſelf a party in his crime, if it refuſes either to puniſh him by its own authority, or to deliver him up to be puniſhed by the offended nation. By ſupporting the exemption of ambaſſadors from being puniſhed by the nation, where they reſide, upon this principle of compact, we ſhall be excuſed from balancing the general utility, which might ariſe from inflicting puniſhment upon them according to the laws and by the authority of this ſtate, againſt the general utility, which ariſes from ſuch an exemption. It was neceſſary for Grotius to examine this queſtion about utility; as he ſuppoſes the privileges of ambaſſadors to depend upon a purely poſitive law eſtabliſhed by the common conſent of mankind. For where mankind are to give them privileges by poſitive agreement; one way of finding out what ſort of privileges are given them is to find out what ſort of privileges will be moſt beneficial: becauſe mankind are moſt likely to have agreed to give them ſuch privileges, as will be attended with the moſt general benefit. But if their privileges ariſe out of the law of nature applyed to civil ſocieties, in conſequence of a tacit compact between the nation which ſends them, and the nation which receives them; all doubt about the utility of theſe privileges is out of the queſtion. For though the law of nature is founded in the general utility of mankind, yet no conſiderations of any utility, which nations might obtain by making their compacts about ambaſſadors different from what they do make them, will outweigh the general utility, which ariſes from ſtrictly obſerving compacts and keeping

keeping up to the terms of them, after they are made. When one nation ſends an ambaſſador to another, the latter is at liberty to receive him upon what terms it pleaſes, and to model its compact and reſtrain the ambaſſadors privileges in ſuch a manner as it judges to be moſt advantageous. But then it will be neceſſary for the nation, to which he is ſent, to expreſs the particular reſtraints, which it deſigns to lay upon his privileges, and for the other nation to agree to theſe reſtraints. For if he is ſent generally by the one, as an ambaſſador, and is received by the other in this character without any expreſs reſerves; the compact, which is between them, will produce ſuch privileges, as we have been deſcribing: and the law of nature upon account of the general utility of keeping compacts will take from the nation, to which he is ſent, the liberty of departing from the terms of the compact, which it has made, upon account of any utility, that might have accrued to it, if it had made a compact of different terms.

What [b] Grotius ſays here about human laws is equally true about human compacts: they admit of an equitable exception in favour of extreme neceſſity. But this exception will not affect the privilege, which ambaſſadors derive from compact, of not being puniſhed by the ſtate, where they reſide, for ſuch crimes, as they commit within its territory. For there is no abſolute neceſſity, that a criminal ſhould be puniſhed at all: the law of nature does not enjoin, it only allows, the inflicting of puniſhment. And there is certainly ſtill leſs neceſſity, that he ſhould be puniſhed by any particular perſon, or at any particular time, or in any

[b] Ibid.

parti-

particular place. But if an ambaſſador ſhould raiſe and head an inſurrection, or ſhould otherwiſe make uſe of open force; it is no breach of the law of nations to oppoſe him by force, even though he ſhould happen to be killed in the quarrel. Grotius diſtinguiſhes here between what is done in the way of defence and what is done in the way of puniſhment. Though the law of nations will not allow an ambaſſadors life to be taken away as a puniſhment for a crime, after it is committed; yet this law, ſince it does not authorize him to do what he pleaſes, does not oblige the ſtate to ſuffer him to make uſe of violence without endeavouring to ſtop it. The foundation of this diſtinction will be evident, if we attend to the principles, which we have been eſtabliſhing. The law of nature in conſequence of our conſent to receive any perſon in the character of an ambaſſador, does not exempt him from all civil juriſdiction: it only exempts him from the civil juriſdiction of our ſtate, whilſt it ſuppoſes him to be ſubject to the civil juriſdiction of his own. But where this juriſdiction ceaſes, the compact, by which his privileges are ſupported, ceaſes to bind us. This compact, like all others, becomes a nullity, when the matter of it fails. The matter of it is, that he ſhall be ſubject to the juriſdiction of his own ſtate and not to the juriſdiction of ours: and conſequently the matter of it fails, where the juriſdiction of his own ſtates ceaſes. This failure does not indeed bring him under our juriſdiction: the only effect of it is to leave us, in reſpect of him, in the liberty of nature, and to diſcharge us at the ſame time from the obligation, that we have laid ourſelves under by compact to conſider him as under the juriſdiction of his own ſtate. In theſe circumſtances

ſtances therefore we have the ſame right to act againſt him by force, that individuals have to act againſt one another in the liberty of nature. Now the juriſdiction of his own ſtate fails for a time, where he is attempting to injure us, and our danger is ſo immediate, as not to allow us time to have recourſe to his own ſtate to repreſs his violence: and conſequently in theſe circumſtances we have a right to make uſe of ſuch natural means of defending ourſelves againſt it, as his conduct makes neceſſary. But after an injury has been committed; there is no neceſſity, that the puniſhment, which he deſerves, ſhould be inflicted immediately. And ſince we have time enough before us to apply to the ſtate, from which he comes; there is, in reſpect of inflicting puniſhment upon him, no failure of the civil juriſdiction, to which by our compact we have allowed him to be ſubject: and conſequently we have no right to inflict puniſhment upon him ourſelves.

[c] Since the privileges of ambaſſadors are immediately derived from the tacit conſent of the nation, which receives them in this character; it is plane, that they have no particular privileges in the territory of a ſtate, through which they are paſſing, either whilſt they are going from home or whilſt they are returning thither; becauſe they are not ſent to this ſtate as ambaſſadors, nor received by it in this character. If they meet with any ill uſage there, the law of nations takes no other notice of it, than if any other perſon, who is a member of a foreign ſtate, had met with the ſame uſage.

[d] The attendants and the goods of ambaſſadors would be ſubject only to the juriſdiction of their own

[c] Ibid. § V. [d] Ibid. § VIII. IX.

ſtate

ſtate, if they were at home: ſince therefore, whilſt they reſide with us, they are conſidered as if they were at home; their attendants and their goods have the ſame privilege, that they themſelves have; that is, the privilege of not being ſubject to our juriſdiction.

But this privilege of the attendants of an ambaſſador, who is received by us, is not a privilege, which is any otherwiſe annexed to their perſons, than as they belong to him. As ſoon as they ceaſe to belong to him, their privileges ceaſe. It is therefore in his power to withdraw their privileges: becauſe it is in his power to diſcharge them from his ſervice and from all connection with him, whenever he pleaſes. But whilſt they continue to be parts of his family, their offences, like his, are not puniſhable by our laws. The method of proceeding againſt them is by applying to him to withdraw his protection. And if he refuſes to withdraw it, he makes himſelf a party in their offence; and application is to be made to the ſtate from which he comes, as if the offence had been his own.

When an ambaſſador has contracted any debts in the ſtate, where he reſides; the civil law of that ſtate cannot take his goods from him, and make them over to his creditors, for the payment of ſuch debts: becauſe his goods, as they belong to him, are ſubject only to the juriſdiction of his own ſtate. The method of recovering what he owes is the ſame as if it had been a debt of any foreigner, who is reſident in his own country, that is, by an application to the ſtate, to which he belongs, and by making reprizals upon the ſtate, if juſtice is denyed.

It will be proper to obſerve, that in the compact, which produces the privileges of an ambaſſador, the

nation, which receives him, is a party on one ſide, and he in his own perſon and the nation, which ſends him, are diſtinct parties on the other ſide: the nation, which receives him, tacitly agrees, by the act of receiving him, both with him and with the nation, which ſends him, to conſider and to treat him, as if he was at home. [e] From hence it follows, firſt, that though he, by miſbehaving himſelf, breaks this compact, as far as he is a party in it, yet this does not diſcharge the nation, where he reſides, from the obligation, which it is under by the ſame compact to the nation, from whence he comes. Secondly, it follows from hence, that, where we and any nation have by mutual agreement ſent ambaſſadors to each other, if that nation ſhould uſe our ambaſſador otherwiſe than the law of nations allows, yet we are not at liberty by way of retaliation to uſe their ambaſſador in the ſame manner. In ſuch a mutual agreement, though their ill treatment of our ambaſſador is a breach of compact on their ſide; yet it will not releaſe us from the obligation, that we are under towards their ambaſſador by the perſonal compact with him.

Public compacts are either treaties or ſponſions.

XXI. The compacts of individuals, which are private compacts, have already been treated of at large. But it may be neceſſary to ſay ſomething concerning public compacts, which are the compacts of nations. Our authors ſubject led him to apply the law of nations to compacts of this ſort, particularly to ſuch as have relation to war, in more inſtances, than we ſhall have occaſion to go through. It will be ſufficient for our purpoſe to explane the general principles of this law, and to ſhew the reader by applying them to a few in-

[e] Ibid. § VII.

ſtances,

ſtances, that there is no other difference in the rules of law or in the rules of interpretation, when they are applyed either to public or to private compacts, beſides what ariſes from the difference between individual perſons, who are the parties in private compacts, and collective perſons, who are the parties in public ones.

[f] Public compacts, are divided, in reſpect of the perſons who make them, into treaties, conventions, or leagues, and ſponſions or engagements.

Treaties, conventions, or leagues, as they are diſtinguiſhed from ſponſions, are made by thoſe, who are authorized by the conſtitution of a nation to act for it with other nations. But it is not neceſſary that theſe conſtitutional governours ſhould act in their own perſon. What they do by their deputies, ſuch as envoys, ambaſſadors, or plenipotentiaries, is their own act; and conſequently in reſpect of the nation it produces the ſame effect, as if they had done it themſelves. In public compacts, which ſovereign princes or other conſtitutional governours of a nation make by their deputies or agents, the law of nature is the ſame, as in promiſes, which individuals make by proxy: what the deputies do under the authority of their public commiſſion binds their principals; even though they exceed ſome private inſtructions, which their principals had given them.

[g] Where the ſucceſſors of a ſovereign prince are choſen occaſionally by the people upon every vacancy of the throne, or are appointed by the ſtanding laws of the ſociety; it is plane that the treaties of the pre-

[f] Grot. L. II. C. XV. § III. XVI. See B. I. C. XII § XVIII.

[g] Grot. L. II. C. XIV. § X. XI. XII.

deceſſor do not bind them upon account of any immediate authority or power, which he has over them. For ſince the right, which they have to the crown, is not derived from any act of his, but from the act of the ſtate, he cannot have any immediate authority over them either to limit this right, or to reſtrain them in the exerciſe of it. His treaties with foreign nations are made binding upon them by the intervention of the ſtate. He is authorized by the ſtate to act for it in conſequence of the office, to which it has appointed him. His acts therefore will bind the ſtate; becauſe they are in effect its own acts. So that if, upon his demiſe, no ſucceſſor was to be appointed and a perfect democracy was to follow; the public under this new form of government would be obliged to fulfill his treaties. But ſince his treaties thus affect the ſtate itſelf; the right of government, notwithſtanding it is tranſmitted to his ſucceſſors, not by his own act, but by the act of the ſtate, cannot be tranſmitted free from the obligation of thoſe treaties, by which the ſtate would have been bound, if it had exerciſed this right itſelf without tranſmitting it to any ſucceſſor. But the power of ſovereign princes thus to bind their ſucceſſors, by the intervention of the ſtate, is not infinite. Beſides the conſtitutional reſtraints, which may be laid upon them by the eſtabliſhed form of government, they are under a general reſtraint ariſing from the ends of civil union. They are appointed by the ſtate to act for the attainment of theſe ends, that is, for the ſecurity and advancement of the common welfare: and conſequently as they are the agents of the ſtate only for theſe purpoſes, no treaties of their making, if they are deſtructive of theſe purpoſes, will bind the ſtate.

ſtate. We ought not however to conclude from hence, that the ſucceſſor of any ſovereign prince, who has made a treaty with a foreign power, is at liberty to break that treaty, when he finds, that it would be for the intereſt of his nation to break it, upon pretence, that the nation could not be bound, and conſequently that he cannot be bound, by a compact, which hinders the advancement of the general good. For though a ſovereign prince has no power to bind the ſtate and by the intervention of the ſtate to bind his ſucceſſor to any thing, which is inconſiſtent with the public good, yet Grotius very properly obſerves, that this rule is confined to what appears in the firſt inſtance to be likely to hinder the public intereſt, and does not extend to what ſeemed at firſt to be of general benefit, though by ſome unforeſeen accident it may become hurtful in the event. If there was a probable cauſe for making the treaty at firſt, it was binding from the beginning; and an accidental change of intereſts, which happens afterwards, will not deſtroy its obligation.

[h] Sponſions or engagements are compacts made by an inferiour magiſtrate or officer on the behalf of the ſtate, to which he belongs, without being authorized to act for it. Such compacts, ſince they are made without the authority of the ſtate, do not bind it, unleſs it confirms them after they are made. But it is not neceſſary, that this confirmation ſhould be an expreſs one. The ſtate, to which the ſponſors belong, tacitly binds itſelf to fulfil what they have engaged for on its behalf, by acting under the engagement, as if it underſtood itſelf to be obliged. But the notoriety of the engagement

[h] L. II. C. XV. § XVI. L. III. C. XXII. § I. II. III.

and the mere ſilence of the ſtate about it will not amount to a tacit confirmation of it; as long as the nation or perſon, with whom the ſponſors have treated, is in poſſeſſion of no corporeal thing and exerciſes no right in conſequence of its engagement. A thing, when it can be claimed by preſcription, muſt have been for ſome time in the poſſeſſion of the claimant: and then the true owner by having knowingly neglected to reclaim it is underſtood to have tacitly relinquiſhed it. If the thing had been all the time in the poſſeſſion of the true owner, there would be no occaſion for him to make any expreſs declarations that the thing is his, in order to keep up his property in it. In like manner where a right is claimed by uſage, the perſon, who claims it, muſt for ſome time have exerciſed it, and they, to whom this right belongs, muſt knowingly have neglected to ſtop him in the exerciſe of it. If he has never exerciſed it, their ſilence could be no mark of their intention to give it up to him: for they had neither occaſion nor opportunity to ſpeak about it. Now a ſponſion, whilſt it proceeds no farther than a bare compact, does not give the perſon, with whom it is made, poſſeſſion of any corporeal thing, and does not imply, that he exerciſes any right in conſequence of it. The notoriety therefore of the ſponſion and the ſilence of the ſtate about it, cannot give the perſon, with whom it is made, any claim upon the ſtate by preſcription or uſage. The ſtate, whatever it may know of the matter, has no occaſion to ſpeak about it, as long as nothing is obtained by it, or nothing is done in conſequence of it. And certainly the ſilence of the ſtate or its neglect to declare, that it does not conſent to the ſponſion, whilſt there is no occaſion to ſay any thing,

thing, or to make any ſuch declaration, is no evidence of its conſent to the unauthorized act of ſome of its members. But if the ſponſors, beſides their bare compact, have given the perſon, with whom it was made, poſſeſſion of ſome corporeal thing, which belongs to the ſtate; or if that perſon in conſequence of this compact exerciſes ſome right, which affects the ſtate; then indeed the knowledge and ſilence of the ſtate about what has been done, its neglect to reclaim the thing or to ſtop the exerciſe of the right, is an evidence of its conſent to the ſponſion.

If the ſtate, to which the ſponſor belongs, neither expreſsly nor tacitly confirms what he has done, but on the contrary declares, that it will not make good his compact; we are next to enquire what the ſponſor himſelf is obliged to. The compact, if we look no farther, binds him only to endeavour, to the utmoſt of his power, to prevail upon the ſtate to make it good. He is bound to do this, becauſe it is poſſible for him to do it: but as far as the ſtate is concerned he is bound to nothing more, becauſe all beyond this is impoſſible. But if we look farther than the bare compact, we are then to conſider, whether the nation or perſons, with whom he treated, knew, that he had no commiſſion to act for his own ſtate. If they knew this, he is ſtill obliged only to endeavour to prevail with the ſtate to make his act its own: whatever they may have granted to him in conſideration of the compact, which they have made with him, he is not obliged to return that advantage; unleſs they have particularly ſtipulated, that he ſhould return it: becauſe they granted it in conſideration of a compact, for the performance of which they knew, that he could

not be anſwerable: and it was their own fault, if they would grant it upon this conſideration. But if he led them to ſuppoſe, that he had authority to act for the ſtate, either by declaring ſo in expreſs words, or by treating with them as if he had ſuch authority, whilſt they knew nothing to the contrary; this is a fraud: and the fraud will oblige him, though the compact does not, to make them amends for the advantages, which they have loſt, or for the damages, which they have ſuſtained by the compact. If his goods are not ſufficient to make them amends, the obligation will extend to his perſon; not indeed to his life, for the loſs of his life could be no amends to them, but to his labour or to the ſale of his labour.

[i] Compacts, which the chief commander of an army or the governour of a town makes with the enemy, are valid, as far as the reſpective commiſſions of ſuch officers uſually extend: for ſo far they are underſtood to be empowered by the ſtate to act for it. The chief commander of an army is authorized by the nature of his commiſſion to exert or to abate the hoſtile acts of his army in ſuch a manner, as he finds to be moſt convenient. He is therefore authorized to grant a truce to a town, that he is beſieging, or to the army of an enemy, that he meets in the field. For a truce is only the abatement or ſuſpenſion of hoſtile acts. But the obligation of this compact includes only himſelf, and the army, which is under his command; becauſe his commiſſion reaches no farther. If therefore, during the truce, he and his army ſhould be called away to ſome other employment, and another commander with another army ſhould be ſent in his place; what he has

[i] Grot. L. III. C. XXII. § VI. VIII.

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done does not bind thoſe, who ſucceed him: ſo that it will be no breach of faith in them, if they do not obſerve the truce, that he has agreed upon. But notwithſtanding any compact, in which he agrees with the enemy to abate the hoſtile acts of his army, will bind him and the army; yet if in making that compact he has abuſed his truſt to the advantage of the enemy, he is accountable to his own ſtate for ſuch abuſe. The nature of his truſt implys, that he has a power to enter into a compact of this ſort: and this power is ſufficient to render the compact valid. The obligation, that he is under, not to abuſe his truſt, regards his own ſtate only, and not the enemy; and conſequently it cannot affect the validity of the compact, which he makes with the enemy.

[k] The commander of an army, though his office empowers him to grant a truce to the enemy, is not authorized by the nature of his commiſſion, either to make that truce general or to make a peace. His power extends only to the army, which is under his command: a general truce therefore, which is an entire ceſſation of hoſtilities between the two nations in all places whatſoever, and a peace, which puts an end not only to all acts of war, but to the ſtate of war between them, are not within the extent of his commiſſion. If compacts, that produce a general truce or a peace, bind the ſtate, when they are made by the commander of an army; the obligation ariſes, not from the nature of his office, but from ſome ſpecial commiſſion, which the ſtate has given him for theſe purpoſes.

[k] Grot. ibid. § VII.

Things

Things taken by an army in war, whether they are moveable or immoveable, are in the firſt inſtance taken for the ſtate, to which the army belongs. [l] The commander of the army has therefore no right, after they are in his poſſeſſion, to give them up to the enemy by compact: or if he has any ſuch right, it is derived, not from the nature of his commiſſion, but from ſome occaſional or cuſtomary grant of the ſtate. The rule about perſons taken in war is the ſame as the rule about things. So that the commander of an army has no other right to exchange priſoners with the enemy, than what comes from the ſpecial grant or the cuſtom of his country. But he is at liberty to treat with the enemy about ſuch things or ſuch perſons, as are not yet in his poſſeſſion: for the ſtate has no claim upon theſe. He is therefore obliged to obſerve the articles, which he has agreed upon with a garriſon, that capitulates, in reſpect either of the town, or the inhabitants, or the ſoldiery.

The governour of a town is the commander of the garriſon, that is, of an army employed for the particular purpoſe of defending the town. The nature therefore of his truſt implys, that his compacts about ſurrendering the town will bind himſelf and the garriſon. If he ſurrenders it, when he might have defended it, or upon worſe terms, than he might have made, he is accountable to his own ſtate for his miſconduct; but the abuſe of his power does not affect any compact, which he makes in conſequence of that power.

[m] When the governour of a town, and the garriſon, that is with him, in order to ſave their lives, agree with the beſiegers not to bear arms againſt them or

[l] L. III. C. XXII. § IX. [m] Grot. L. III. C. XXIII. § VII.

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their nation, either for a certain number of years, or for ever; ſome have thought this compact to be void, becauſe it is contrary to the duty, which they, who ſubmit to this condition, owe to their country. But Grotius replys, that the duty, which they owe to their country, does not affect this compact; ſince they were in the enemys power, and could never have been able to have done their country either military or any other ſervice, if they had not ſubmitted to theſe terms.

Compacts between nations at peace or nations at war.

XXII. Public compacts, in reſpect of the circumſtances or condition of the nations, that are parties to them, are divided into ſuch, as are made by nations, that are at peace, and ſuch as are made by nations, that are at war. Treaties of the former ſort ſometimes relate to the terms or conditions of trade or commerce between the two nations; and then they are called tariffs: ſometimes they relate to the aſſiſtance, which one nation is to give to the other in war; and then, if no payments are to be made on either ſide, they are called alliances; or if one nation ſtipulates to pay for the aſſiſtance of the other, they are called treaties of ſubſidy. In ſhort any rights or obligations, which are conſiſtent with the law of nature, may be produced, and any rights and obligations of the law of nature may be drawn out into view or be aſcertained, by expreſs treaties between nations, that are at peace with one another.

Public compacts with an enemy are either ſuch, as ſuppoſe the war to continue, or ſuch as put an end to it. [n] Puffendorf has raiſed a groundleſs doubt about the obligation of compacts of the former ſort. A ſtate of war, he ſays, implys a liberty of taking all advantages, that we can againſt our enemy. From whence

[n] B. VIII. C. VII. § II.

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he concludes, that it is a contradiction to ſuppoſe, that a ſtate of war continues, and yet that we are under any obligation of compact towards our enemy. For if on the one hand we are at liberty to take all advantages, that we can, againſt our enemy; we are at liberty to depart from our compact, whenever we can make any advantage by departing from it; ſo that our compact does not oblige us: and if on the other hand our compact obliges us to give up ſuch advantages, as we might gain by departing from it, the ſtate of war does not continue; becauſe a ſtate of war implys a liberty of taking all advantages whatſoever againſt our enemy. This difficulty will be removed, if we diſtinguiſh between an abſolute ſtate of war, and a ſtate of war under ſome limitations: an abſolute ſtate of war does indeed imply a liberty of taking all advantages, that we can, againſt our enemy. But we may give up this liberty in part by compact: and yet when we have done this, the ſtate of war will ſtill continue; not indeed in its full extent, but under ſuch limitations, as ariſe from this compact. For the effect of compacts, which are made between nations, that are at war, and which ſuppoſe the ſtate of war to continue, is to abridge the liberty of war without putting an end to it.

[o]A truce is a compact, by which the perſons, who are parties in it, bind themſelves not to do any acts of war for a certain time, though the ſtate of war continues. It differs therefore from a compact of peace, as it does not put an end to the ſtate of war. The parties oblige themſelves not to do any hoſtile act during the time, that is agreed upon: but when this time is expired, there is no occaſion either for any new declara-

[o] Grot. L. III. C. XXI. § I.

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tion of war or for any new cauſes to juſtify going on with the war. The truce, whilſt it laſted, reſtrained the ſtate of war from producing its proper effects: but as ſoon as the truce expires, the ſtate of war then exerts itſelf and produces theſe effects. Sometimes a truce is called a temporary peace: but when we call it ſo, we uſe the word — peace — only in oppoſition to acts of war, and not in oppoſition to a ſtate of war.

One reaſon for enquiring, whether nations continue in a ſtate of war during a truce, is, becauſe there may be ſome treaties between them, which are limited to times of peace, or ſome on the other hand, which are limited to times of war; and then it may be a doubt, which of theſe treaties ſubſiſt during a truce? To this queſtion Grotius anſwers, that ſuch compacts only, as are limited to times of war, and not ſuch, as are limited to times of peace, will continue in force during a truce.

The chief queſtions relating to a truce may be eaſily determined either by conſidering the nature of the compact itſelf or by applying to it the common rules of interpretation.

[p] When a truce is by agreement to continue from ſome one certain day till another certain day, it may be a queſtion, whether both theſe days are included in it, if the compact does not ſay in expreſs words, whether they are to be reckoned incluſively or excluſively. Grotius allows, that the day, which is fixed for the ending of the truce, is to be reckoned incluſively. This day is indeed the limit of the time: but the limits of natural things may be of two ſorts; they may either be parts of the thing, as the ſkin, which is a part of the hu-

[p] Grot. Ibid. § IV.

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man body is likewiſe the limit of the body; or elſe they may be different from the thing itſelf and no part of it, as a river, which is the limit of a field or of a meadow, is no part of the field or meadow. But it is moſt natural to reckon the limit of a thing as a part of the thing itſelf. He contends however, that the day, from which the truce is to begin, is not to be reckoned incluſively; becauſe the word — from — is disjunctive and not copulative; this word in its uſual ſenſe ſeparates the day, which is firſt mentioned, from the reſt and does not joyn it to them. One would rather think that this firſt day is the limit of the truce at one end, as the laſt day is the limit of it at the other end; and conſequently, that there is the ſame reaſon for reckoning the firſt day, that there is for reckoning the laſt day, as a part of the time, which is included in the truce. Certainly the common uſe of the word —from— is no objection againſt this way of reckoning: for when we ſay from head to foot, the head as well as the foot is included within the reckoning.

Truces, as we have already had occaſion to obſerve, are either general or particular: if the parties agree to ſuſpend all acts of war in all places whatſoever, this is a general truce; if they agree to ſuch a ſuſpenſion in ſome one or ſome few places only, the truce is a particular one. [q]When a truce is agreed upon by the conſtitutional governors of the nations, that are parties in the war, though it binds the whole nation on each ſide, no acts of war, which are done by the members of either nation, will be a breach of the truce, unleſs thoſe members knew, that it had been agreed upon: becauſe it can only oblige the whole nation, when it is ſo

[q] Grot. Ibid. § V.

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promulgated, that the whole nation may know it. Such truces, as are granted by the chief commander of an army are ſubject to the ſame rule. But in theſe truces the rule has no great uſe; becauſe they are commonly known immediately to all the perſons, who are concerned in them.

[r] Truces may either be abſolute or conditional. A truce which is made without any conditions annexed to it, though it binds the parties not to do any hoſtile acts towards one another, leaves them at liberty to fortify their towns, to raiſe new armies, to build ſhips, or in any other reſpect to put themſelves into a better poſture of defence, than they were in before. For by agreeing merely not to do any hoſtile act, they cannot be underſtood to have bound themſelves not to guard, as well as they can, againſt any future hoſtile acts, which may be done againſt them. Conditional truces are broken, when one of the parties does any thing, which is contrary to the conditions, that have been agreed upon. And univerſally, a breach of truce on one part will juſtify the other part in beginning hoſtilities again before the time of the truce would have otherwiſe expired.

All truces granted for a certain purpoſe, are confined to this purpoſe; and the party, which makes uſe of the ceſſation of hoſtilities, to do any thing, that is not included within this purpoſe, and that is to the diſadvantage of the other party, breaks the truce. For as this purpoſe is the ſole reaſon of the compact, the right ariſing from the compact can extend no farther, than this purpoſe extends. Thus when a truce is granted to a beſieged town for the purpoſe of burying

[r] Grot. Ibid. § VI. X.

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the dead, it is a breach of compact to make uſe of the oppoſtunity, which ſuch a truce may afford, to bring any new ſupplies of men or of proviſions into the town: the beſiegers, as they granted the garriſon a ceſſation of arms only for the purpoſe of burying the dead, have a plane right, notwithſtanding their compact, to hinder it by force from making any other advantage of this ceſſation.

[s] Paſſports, or letters of ſafe-conduct, which are granted to enemies in time of war, are to be conſtrued by the common rules of interpretation. The nature of a paſſport does not particularly require, that the words of it ſhould always be underſtood in their moſt extenſive ſenſe, or that the meaning of it ſhould always be extended beyond the common acceptation of the words, ſo as to make the favour, which it grants, as complete as poſſible: whether it is to be interpreted liberally or not, muſt be determined in the ſame manner, as if we had any other writing to conſtrue. On the contrary, if there is any difference between the rules of interpreting paſſports, and of interpreting other compacts, there appears at firſt ſight to be more reaſon for thinking, that we ought in interpreting paſſports to adhere cloſely to the letter of them: becauſe the circumſtances of the parties concerned in them, that is, of thoſe, who grant them, and of thoſe, to whom they are granted, are ſuch as afford no room to preſume, that the former deſigned to beſtow any extraordinary favour upon the latter. However, this is no general rule for the interpretation of paſſports: it is not neceſſary, that they ſhould always be interpreted cloſely; becauſe though we have no room to preſume a deſign to

[s] Ibid. § XIV.

beſtow

beſtow any extraordinary favour, we muſt allow thoſe, to whom a paſſport is granted, as much favour, as they, who granted it, deſigned to beſtow: and conſequently we muſt collect the meaning of the writer, as we collect the meaning of other writers; from his words only, if they are clear and preciſe; or from his words and other ſigns together, if his words are obſcure or ambiguous; or from other ſigns only, if there is ſufficient reaſon to believe, that his words do not expreſs his meaning perfectly.

Cartels, which are compacts made between two nations, that are at war, about the exchange or ranſom of priſoners, are to be interpreted by the ſame rules.

There can be no doubt about the obligation of compacts, which put an end to war and reſtore peace: nor is there any appearance of reaſon for imagining, that theſe compacts are to be interpreted by any rules, which are different from the common rules of interpretation. It may however be proper to obſerve, that, whilſt [t] Grotius diſtinguiſhes between breaking a peace and giving a new occaſion for war, the only real difference between them is, that when a nation is ſaid to break a peace, we mean, that it does an injury in reſpect of the rights, which were acquired or aſcertained by ſome compact of peace; whereas it is more particularly ſaid to give a new occaſion for war, when it does an injury in reſpect of ſome other rights. But notwithſtanding this difference, breaking of a peace is in effect giving a new occaſion for war: becauſe the compact of peace, as it put an end to any former war, took away at the ſame time all former occaſions of war.

[t] L. III. C. XX. § XVII.

Equal and unequal compacts of nations.

XXIII. [u] If we conſider the terms or conditions of public compacts, we may divide them into equal and unequal.

The matter of equal compacts may either be the benefit of peace, or ſome other mutual benefit. All compacts are equal, where the inconveniences, which both parties ſtipulate to bear, or the benefits, which both parties ſtipulate to receive, are equal. Compacts for reſtoring peace are equal, if the parties bargain for a mutual reſtitution of priſoners, or of goods, which they have taken in the war, and for equal ſecurity to be given on both ſides for preſerving the peace. Other equal compacts of mutual benefit relate either to trade and commerce, or to mutual aſſiſtance in war, or to any other matter, from whence benefit may ariſe to the contracting parties.

Public compacts are called unequal ones, when the inconveniences or the benefits, which they produce to the contracting parties, are unequal. Sometimes the weaker or inferiour party is entitled by the compact to a greater benefit, than the ſtronger or ſuperiour party; as when a ſtronger ſtate engages to aſſiſt another, that is weaker, and ſtipulates either for a leſs aſſiſtance or for none in return. Unequal compacts, which lay the greater burden upon the inferiour party, are either ſuch as diminiſh the ſovereign power, which the inferiour nation has over itſelf, or ſuch as do not diminiſh this power. If the inferiour nation binds itſelf not to make war without the conſent of the ſuperiour; this condition diminiſhes its ſovereign power: for the power of making war by its own act is a part of the ſovereign power of a nation. Grotius goes on to divide

[u] Grot. L. II. C. XV. § VI. VII.

the

the unequal burdens, which may be laid by compact upon the inferiour nation, into ſuch as are tranſient and ſuch as are permanent. Amongſt the former ſort he reckons an obligation to pay the forces, that the ſuperiour party has employed againſt it in a war, or the diſmantling of its towns, or the giving of hoſtages, or the yielding up of ſome part of its territory, or of its military ſtores or of its ſhips of war: theſe are called tranſient burdens, becauſe they ſoon end. But the burden will be a continued or permanent burden, if the inferiour nation binds itſelf not to build forts in ſome particular places, within its own territory, not to go with ſhips of war or with any other ſhips into ſome particular parts of the ocean, or not to keep up more than a certain number of ſhips: theſe and many other burdens of the like ſort, though they are of indefinite continuance, do not make the inferiour ſtate dependent upon the ſuperiour for the exerciſe of its ſovereign power. [v] A farther burden of this ſort is an obligation of the inferiour party to pay a proper reſpect to the ſuperiour and to acknowledge its ſuperiority. This however does not imply a loſs or a diminution of ſovereign power; provided all the ſuperiority, which it is obliged to acknowledge, is a ſuperiority only of rank or dignity and not of power: for one ſtate may be acknowledged ſuperiour to the other in rank or dignity, whilſt the latter ſtill continues to govern itſelf independently of the former.

XXIV. [w] Grotius obſerves, that ſome public compacts are of the ſame tenor with the law of nature, or contain nothing but what is matter of natural right; whilſt others are of a different tenor and produce ſuch rights, as

Compacts of the ſame matter with law of natur or of different matter.

[v] Grot. L. I. C. II. § XXI. [w] L. II. C. XV. § I.

as the law of nature would otherwiſe not have given us. Compacts of the former ſort are more particularly uſeful, where the law of nature admits of ſome latitude, and the preciſe rights, which ariſe out of it, depend upon the circumſtances that we happen to be in. Expreſs treaties, though in theſe inſtances they contain nothing but what is matter of natural right, ſerve to aſcertain ſuch rights, as might otherwiſe have been controverted. Thus it is matter of natural right, that a neutral ſtate ſhall not convey any contraband goods to our enemy. But what are, and what are not, to be reckoned contraband goods depends upon ſuch circumſtances as may leave ſome room for cavil; if the ſeveral ſorts of goods, that are to be reckoned contraband, have not been ſpecifyed in ſome expreſs treaty.

This obſervation of Grotius will furniſh us with another, that may be of ſome uſe in judging about the law of nature or of nations, from what nations have ſtipulated with one another in expreſs treaties. Though moſt nations ſhould at ſome time or other have made treaties, in which they have ſtipulated the ſame thing; yet we cannot conclude from hence, that what they have thus ſtipulated is a right of the law of nature or of nations; becauſe the matter of expreſs treaties is not always matter of natural right. On the contrary, we cannot conclude, that what has been thus ſtipulated is not preſcribed by the law of nations, becauſe expreſs treaties ſometimes contain what would have been matter of natural right, though no ſuch treaties had ever been made. We may explane this obſervation by the inſtance, which we juſt now mentioned. If in enumerating the ſeveral ſorts of contraband goods, any particular ſort of goods has been omitted in ever ſo many

expreſs

expreſs treaties; this is no evidence, that it is not contraband by the law of nations: becauſe though a neutral ſtate would naturally have had no right in time of war to carry this ſort of goods to our enemy, yet we might give it ſuch a right by expreſs treaty; and any other nations that have ever made any treaties about the like goods may have done the ſame thing. On the contrary, if in any expreſs treaties we find, that ſome particular ſort of goods has been excepted as not contraband; this exception is no evidence, that they are contraband by the law of nature: becauſe expreſs treaties are ſometimes of the ſame tenor with the law of nature; ſo that the exception may poſſibly have guarded againſt nothing, but what the law of nature or of nations, when rightly underſtood, would have guarded againſt without it.

CHAP. X.

Of the changes, that are made in ſtates and in their civil conſtitutions.

I. *Three ways, in which civil conſtitutions are liable to be changed.* II. *Uſage may change a civil conſtitution.* III. *Civil conſtitutions may be changed by expreſs conſent.* IV. *Unjuſt force does not change a civil conſtitution in right.* V. *Conſtitutions may be changed upon failure of ſupreme governours.* VI. *Abdication may occaſion a change in civil conſtitutions.* VII. *Patrimonial kingdoms are not naturally diviſible.* VIII. *Rules of ſimply hereditary ſucceſſion.* IX. *Lineally hereditary ſucceſſion what.* X. *Effect of abdication in lineally hereditary ſucceſſion.* XI. *Change of conſtitution upon breach of compact.* XII. *Sameneſs of a civil ſociety, what it conſiſts in.* XIII. *Several ways, in which a ſtate may ceaſe.* XIV. *Change of conſtitution does not change a ſtate.* XV. *Some ſorts of changes in a ſtate do not deſtroy it.* XVI. *Variable qualities of a ſtate.* XVII. *Conqueſt in an unjuſt war produces no effects of right.* XVIII. *What effects may be occaſioned by conqueſt in a juſt war.*

Three ways, in which civil conſtitutions are are liable to be changed.

I. [a] THE civil conſtitutions of all ſtates are eſtabliſhed by a compact between the governing part of the ſtate, and the body of the people: and as long as the obligation of this compact continues, neither of the parties in it can of right change the conſtitution; becauſe the law of nature requires both of them to obſerve their compact. But this obligation may ceaſe three ways. Firſt; though it cannot be made void by the ſeparate act of either party, yet they may releaſe one another by mutual conſent. Secondly;

[a] See B. II. C. IV. § IV. C. VI. § II.

if

if at any time there is no governing part in being, the obligation will be void; becauſe there can be no compact or no obligation of a compact, where there is only one party. Thirdly; a wilful and notorious violation of the compact on the ſide of the governours, will diſcharge the people from their obligation. Upon any of theſe events the people, that is, the body of the ſociety, will be at liberty, as they were originally, to eſtabliſh any form of government, that they pleaſe.

Uſage may change a civil conſtitution.

II. Civil conſtitutions are ultimately founded in a law, which proceeded from the collective body of the ſtate before the legiſlative power was veſted in any particular part of it. But we may argue about them as if they were wholly founded in compact: becauſe a compact between the governing part of the ſociety and the people is the immediate cauſe, which eſtabliſhes this law ſo as to make it binding upon both of them; and whatever alters the terms or conditions of that compact, will likewiſe alter the tenor of the law, that is eſtabliſhed by it.

[b] Both the law and the compact, that we are ſpeaking of, are commonly unwritten ones; and uſage or continued practice is the only evidence of the tenor of either of them. Whatever conſtitution therefore might appear from former uſage to have been eſtabliſhed in any civil ſociety; a different or a contrary uſage, after it obtains, will afford the ſame evidence, that the governours and the people have mutually agreed to change the conſtitution by releaſing one another from the terms or conditions, to which they had obliged themſelves by their former compact, and by entering into a new one, in which the terms or conditions are

[b] Grot. L. II. C. XI.

different. Thus an abſolute monarchy may become a limited one, or a limited monarchy may become an abſolute one, by uſage, that is, by the tacit conſent of the king and the people.

Civil conſtitutions may be changed by expreſs conſent.

III. [c] If the conſtitutional governours and the people releaſe one another by expreſs conſent from the obligation of the compact, by which the old form of government was eſtabliſhed; the body of the ſociety will then be at liberty to eſtabliſh a new one. Or if, without any ſuch antecedent releaſe, the conſtitutional governours and the people expreſsly agree to eſtabliſh a new form of government; this agreement will be a tacit releaſe of both parties from their reſpective obligation of adhering to the old one: becauſe they cannot intend to bind themſelves by a ſecond compact without intending at the ſame time to ſet aſide the obligation of the firſt, which, if it ſtill ſubſiſted, would make the obligation of the ſecond impoſſible.

The legiſlative body of a ſtate is only one of the parties in the compact, by which the conſtitution of the ſtate is eſtabliſhed: and conſequently the acts of this body, though they bind the whole ſociety in other things, will not be ſufficient to change the conſtition without the immediate and direct conſent of the people. In limited monarchies, where the people act in the legiſlative by their repreſentatives, if we do not attend to this rule, we may be apt to imagine, that as the conſent of the repreſentatives is in other inſtances the conſent of the people, ſo their conſent in concurrence with the reſt of the legiſlative body would be ſufficient to change the conſtitution from a limited to an abſolute monarchy. But theſe repreſentatives are

[c] See B. I. C. XII. § IX.

a part of the legiſlative body; and the joynt conſent of this whole body, though they are included in it, is only the conſent of one party in the compact, by which the conſtitution was eſtabliſhed. When a conſtitution is diſſolved by a notorious and wilful violation of compact on the part of the civil governours, or by the abdication or other failure of theſe governours; the people may chuſe repreſentatives to act for them in reſtoring the old conſtitution, or in ſettling a new one: and what theſe agents, who are choſen and appointed for this purpoſe, ſhall do on the behalf of the people, will bind their principals. But agents, who are choſen and appointed by the people to exerciſe their conſtitutional ſhare of the legiſlative power, act under the conſtitutional compact, and conſequently are not authorized by ſuch an appointment to change the terms of this compact.

But what the legiſlative body of a ſtate does with a deſign to change the conſtitution, either in a mixed form of government or in any other form, though it does not in right produce the change, which was deſigned, may be the occaſion of producing it. If the people acquieſce in what the old legiſlative has done, and ſubmit, without being compelled by force, to act under the new one, as if they approved of it; this acquieſcence and ſubmiſſion is an evidence of their conſent.

IV. [d] Unjuſt force, whether it comes from the civil governours or from the people, can only change a conſtitution in fact and not in right; till the power, which has been ſeized by either party contrary to the conſtitutional compact, has been given up by the ex- Unjuſt force does not change a conſtitution in right.

[d] See B. I. C. XII. § XVI.

preſs

preſs and free conſent of the other. Uſage alone is not ſufficient to eſtabliſh a conſtitution, which has been thus introduced: [e] for uſage or preſcription will give the poſſeſſor no claim either to corporeal or to incorporeal things, where the firſt poſſeſſion is diſhoneſt. And the ſubſequent conſent of the injured party, even though it is expreſs, will do nothing, if any unjuſt force is made uſe of to obtain it.

Conſtitutions may be changed upon failure of ſupreme governours.

V. When there are no ſupreme governours in being, the conſtitution of government ceaſes, becauſe the people are then the only remaining party in the compact, by which it was eſtabliſhed. Such a failure of ſupreme governours is poſſible in almoſt any of the forms of government, but it is moſt likely to happen in thoſe, which are monarchical either in whole or in part. A monarchy is indeed ſo far from being a firm and laſting conſtitution in itſelf, that it will fail upon the death of the firſt monarch, [f] if ſuch poſitive proviſions are not made for continuing it, as do not ariſe out of its own nature.

The law by making a kingdom hereditary will preſerve the conſtitution upon the event of the poſſeſſors death: for as the anceſtor was a party to the conſtitutional compact, and ſupported the obligation of it, as long as he lived, ſo immediately upon his death the law brings the heir into his place and makes this heir a party in it. But the conſtitution may poſſibly fail, notwithſtanding this proviſion has been made for the continuance of it. If the family, upon which the law entails the kingly power, is wholly extinct, or if no ſuch heirs are left in it as the law deſcribes; the people will then be at liberty either to chuſe a new monarch, or to introduce a new form of government.

[e] See B. I. C. VIII. § IV. [f] See B. II. C. IV. § V. VII.

VI.

VI. When the conſtitutional governours of a ſtate have abdicated or relinquiſhed their power; there will be no ſuch governours in being: the people therefore will be releaſed from the obligation of the compact, which ſupported the conſtitution, and will have a right to alter it, if they think proper.

Abdication may occaſion a change in civil conſtitutions.

[g] Conſtitutions, that are monarchical, either in whole or in part, will ceaſe upon the abdication of the preſent poſſeſſor of the kingdom, notwithſtanding the law has provided for the continuance of them by making the kingdom hereditary: for by abdicating for himſelf, he abdicates likewiſe for his children or other heirs, and cuts them off from the ſucceſſion. The whole effect of a civil law, which eſtabliſhes inheritance, conſiſts in tranſmitting to the children or other heirs what the anceſtor poſſeſſes at the time of his death. If he therefore in his life-time has abdicated or relinquiſhed his right, the law will produce no effect at his death; there will be nothing left for them to claim under the law, and nothing left for the law to tranſmit to them.

If we ſhould be asked here, whether a civil law by making a kingdom hereditary, that is, by appointing an heir to the perſon, who poſſeſſes it at preſent, will not bring this heir into the right of his anceſtor immediately upon the abdication of the anceſtor? the terms of the queſtion will ſupply us with a proper anſwer to it. A man may have a ſucceſſor at any time, but he cannot have an heir, till he is dead: for an heir is a perſon, who ſucceeds into the right of another, not upon any event whatſoever, but only upon the event of this others death. If the law therefore has done nothing more than make the kingdom

[g] Grot. l. II. c. VII. §. XXVI.

here-

hereditary, by appointing a ſucceſſion of heirs, it only provides, that no vacancy of the throne ſhall happen by the death of the preſent poſſeſſor: a vacancy, that is made by his abdication, does not come within the view of the law, and no proviſion is made by it for filling up ſuch a vacancy.

Since an abdication thus diſſolves a monarchical conſtitution, the people are at liberty upon this event either to introduce a different form of government, or to reſtore the monarchy, either in its former extent or under new limitations. And in whatever ſhape they reſtore it, they may grant the kingly power to a new family; or they may paſs over the perſon, who would have been the heir to it, if no abdication had happened, and may grant it to others, who ſtood more remote than he in the former ſucceſſion; or laſtly they may call him to the throne by expreſs grant, or may ſuffer him to take poſſeſſion of it without interruption. But whether he obtains it by grant or by ſufferance, his right is derived from the immediate conſent of the people, and not from the operation of the civil law, which had eſtabliſhed an hereditary ſucceſſion, before the abdication of his anceſtor.

Hitherto we have argued in this queſtion from our authors principles. But hereditary ſucceſſion may be either ſimple or lineal: and Grotius confines theſe principles to the former ſort. He maintains, that a law, which eſtabliſhes lineal inheritance, will produce a different effect from a law, which eſtabliſhes ſimple inheritance; that where lineal inheritance is eſtabliſhed the abdication of the anceſtor will not affect the heirs, though where ſimple inheritance is eſtabliſhed it will cut them off from the ſucceſſion. To clear up this

matter

matter, it will be neceſſary for us to take a view of what Grotius ſays concerning the ſeveral rules of ſucceſſion to kingdoms.

VII. [h] Our authors firſt rule about the ſucceſſion to patrimonial kingdoms is, that they are diviſible inheritances, that as the preſent poſſeſſor of ſuch a kingdom is empowered to appoint his own heir, ſo he is not obliged to tranſmit the kingdom entire to any one perſon, but is at liberty to divide it into as many parts as he pleaſes, and to appoint as many ſucceſſors, as there are parts, with ſovereign power over each part. We will enquire preſently, whether the ſtate could not give him this power by an expreſs act? or whether the acquieſcence or tacit conſent of parties will not confirm ſuch a diviſion after it is made, though he had originally no power to make it? The point, that we are to conſider now, is, whether a patrimonial kingdom is in its own nature a diviſible inheritance? The nature of civil ſociety and of civil power will lead us to think differently from Grotius upon this point. All the parts of a ſtate are united into one body by the ſocial compact, and muſt remain united, as long as no alteration is made in this compact. But a civil governour cannot change this compact; becauſe he is obliged by the nature of his office to act under it, and conſequently he cannot divide the ſtate or ſeparate the parts of it from one another. The civil power, with which he is inveſted, gives him a right to govern the ſtate; but it only gives him a right to govern it as a ſtate, that is, as a body of men, who are united by compact for the purpoſes of ſecuring their rights, and of advancing their general benefit.

Patrimonial kingdoms are not naturally diviſible.

[h] L. II. C. VII. § XII.

[i] The

[i]The tenure, by which this power is held, will not alter the nature of it. If ſtates are indiviſible things in themſelves, the power of governing them, though it ſhould be patrimonial, will not extend to a power of dividing them. The notion of a patrimonial kingdom implys, that the poſſeſſor of the kingly power is at liberty to diſpoſe of it, to whom he pleaſes. But this liberty cannot extend farther, than the nature of the thing, which is to be diſpoſed of, will allow. Where kingly power is the thing to be diſpoſed of, the poſſeſſor, though he holds it as a matter of patrimony, can diſpoſe of it only as kingly power, that is, as the power of governing a collective body of men, all the parts of which are united to one another by the ſocial compact.

[k]Grotius allows, that kingdoms, which are made hereditary in inteſtate ſucceſſion by any act of the people, are indiviſible things: becauſe it may be preſumed, that the people, when they made ſuch a ſettlement, intended what is moſt for the common benefit: and the ſecurity of the whole will be better provided for, if the ſtate continues entire, than if it was to be divided upon every deſcent of the civil power into a number of leſſer ſtates. But this reaſon may be applyed as well to patrimonial kingdoms as to kingdoms, which are hereditary in inteſtate ſucceſſion. Grotius indeed ſpeaks of patrimonial kingdoms, as if the right of governing them was acquired and tranſmitted independently of the peoples conſent. But by whatever means the kingly power might be acquired, we have ſhewn in another [l]place, that the conſent of people is as neceſſary to

[i] Grot. L. I. C. III. § XI.
[k] L. II. C. VII. § XIV.
[l] See B. II. C. IV. § XIV.

make

make it patrimonial, as to make it hereditary in inteſtate ſucceſſion. If therefore we may preſume, that a ſtate is an indiviſible thing, where the civil power is made hereditary by the conſent of the people; there is the ſame preſumption, that it is an indiviſible thing, where this power is patrimonial; becauſe it could not be made patrimonial without the like conſent of the people. Or if we ſhould ſuppoſe with our author, that the conſent of the people has nothing to do either in acquiring or in tranſmitting the civil power in patrimonial kingdoms; yet ſtill the ſecurity and common intereſt of all the parts of a civil ſociety, as it is the end of ſocial union, muſt likewiſe be the end of all civil government: becauſe when a ſociety is formed for any particular purpoſe, it is impoſſible, that the power of governing this ſociety after it is formed, ſhould not have the ſame purpoſe in view. Since therefore our author allows, that the ſecurity and common intereſt of all the parts of a ſtate will require, that it ſhould be indiviſible; the conſequence is, that the civil government of it cannot in its own nature be tranſmitted in ſuch a manner as to divide the ſtate: though the people have not made it indiviſible by any other act, the mere act of ſocial union is ſufficient to make it ſo.

When I ſay, that a patrimonial kingdom is indiviſible in its own nature, I do not mean, that no act whatſoever can divide it. The ſocial compact makes a ſtate one indiviſible thing in its own nature; and it muſt continue one thing, as long as this compact ſubſiſts without being altered. Now the civil power of governing a ſtate is ultimately founded in this compact: for if there was no ſuch compact, there could be no ſtate,

and

and conſequently there could be no civil power. But ſince the nature of civil power thus preſuppoſes the obligation of the ſocial compact; the perſon, who is in poſſeſſion of this power, though he holds it patrimonially, is not authorized by it to alter the terms of this compact. The people however, as they are the parties to this compact, may releaſe the obligation and alter the terms of it by their conſent: not indeed without the conſent of the perſon, who is inveſted with the ſovereign power; becauſe he has an intereſt, that the ſtate ſhould not be divided, and this intereſt cannot of right be taken from him, unleſs he agrees to give it up. But there is nothing, which will hinder the ſtate from being divided by the joynt conſent of him and the people. A ſtate is naturally one thing, as long as the compact, which united the members or parts of it into one body, continues the ſame in all points; it cannot naturally be divided, till this compact is altered. And though this compact may in part be releaſed by the joynt conſent of the ſovereign governour and of the people; yet ſince it cannot be ſo releaſed by the ſingle act of the ſovereign governour; a kingdom, though it ſhould be patrimonial, cannot be diſpoſed of as a diviſible inheritance by the poſſeſſor of it.

Thus whilſt Grotius maintains, that a patrimonial kingdom is in itſelf a diviſible inheritance, and cannot be made indiviſible without ſome poſitive act of the ſociety; the nature and ends of ſocial union and of civil government will rather lead us to conclude on the contrary, that all ſtates, whether the civil power in them is held patrimonially or otherwiſe, are indiviſible in themſelves, and cannot be made diviſible without

ſome

ſome poſitive act, in which the people concur to make them ſo.

Though the poſſeſſor of a patrimonial kingdom, if ſuch a tenure of civil power had been any where eſtabliſhed, would have a right to appoint his ſucceſſor by will, or by any other act of his own; yet if he had neglected to appoint a ſucceſſor, it may reaſonably be queſtioned, whether the kingly power would deſcend in inteſtate ſucceſſion, unleſs the civil law had made the kingdom hereditary upon failure of ſuch an appointment. For a patrimonial right in the ſovereign power, which is an incorporeal thing, is in this reſpect like the property of an individual in corporeal things: [m] the proprietor of a thing has a right to diſpoſe of it by will; but if he has made no will, neither his children nor any one elſe can claim it in inteſtate ſucceſſion without the aid of poſitive law. Upon theſe principles the death of a patrimonial king would put an end to the ſucceſſion, and the ſovereign power would return to the body of the ſociety, from whence it originally came; if he had appointed no heir, and the civil law had not appointed one for him.

If we ſuppoſe, what our author takes for granted, that in a patrimonial monarchy the tenure, by which the ſovereign power is held, will make it deſcend as an inteſtate inheritance without the aid of any poſitive law, when the laſt poſſeſſor has not appointed an heir; the next queſtion will be, to whom this power will deſcend? let us ſuppoſe, that it will deſcend to his children; and then the queſtion will be, in what order his children are to inherit? All of them have equal claims: but they cannot all inherit at once. The ſtate cannot

[m] See B. I. C. VII. § IV.

be divided amongſt them, ſo that each of them may have kingly power over a ſeparate part: becauſe a ſtate is in its own nature one indiviſible thing. And they cannot inherit this power joyntly; becauſe the conſtitution is monarchical, by the ſuppoſition, and ſuch a joynt inheritance of the ſovereign power would change it into an ariſtocracy. Therefore to ſatisfy their equal claims, they muſt take one after another. This is the rule in all indiviſible things, whether they are corporeal or incorporeal. Thus the ſeveral fellows of a college in our univerſities have an equal right to the common emoluments of their places or fellowſhips. The rents and other profits ariſing from the eſtate of the college are diviſible emoluments; and each of the fellows may receive his reſpective ſhare of them at the ſame time, in ſuch proportion as the ſtatutes or cuſtoms of the college direct. But the right of ſucceeding to an eccleſiaſtical benefice, which is in the patronage of the college, is an indiviſible emolument: they have all an equal right to ſucceed to it, when it happens to be vacant, but only one of them can ſucceed at one and the ſame time. Therefore to ſatisfy this right they muſt ſucceed to it one after another in that order, which has been eſtabliſhed by the local ſtatutes, or by the cuſtoms of the college, or by the particular appointment of the donor.

Our authors rule in patrimonial kingdoms, when they become hereditary by accident, is, that each child of the laſt poſſeſſor, whether it is a male or a female, is to ſucceed according to the order of birth. [a] In kingdoms, which are not patrimonial, but are made hereditary in inteſtate ſucceſſion by the act of the people;

[a] Grot. L. II. C. VII. § XVII.

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he propoſes a rule, which is ſomething different from this, and gives a preference to the males before the females, though the males ſhould happen to be younger than the females. He does not inform his readers, why he makes this difference: but the reaſon, by which he ſupports the latter rule, will help us to conjecture upon what reaſon he founds the former. In kingdoms, which are made hereditary by the act of the people he ſays, that the males will be preferred in the ſucceſſion before the females; becauſe the former are more fit for the buſineſs of war and of civil government. But if a view to the ſecurity and common intereſt of the ſociety is what gives a preference to the males before the females in kingdoms, which are made hereditary by the act of the people; we may reaſonably conclude, that he gives no ſuch preference in patrimonial kingdoms, which become hereditary by accident, becauſe he ſuppoſes, that in the ſucceſſion to kingdoms of this ſort, no regard is to be had to the ſecurity and common intereſt of the ſociety, that nothing is to be conſidered beſides the benefit of the reigning family, and conſequently, that the order, which is to be followed in the ſucceſſion, is the order, which nature has marked out in this family by priority of birth. But if this was the reaſon, why he made a difference between the rules of ſucceſſion in theſe two ſorts of kingdoms, it will not be ſufficient to ſupport this difference. For ſince the ſecurity and common intereſt of the ſtate is the end of ſocial union, it muſt likewiſe be the end of civil government: and conſequently wherever civil law has given no expreſs directions about the order of ſucceſſion to the civil power; the ſucceſſion is to be directed by this principle, as well in patrimonial kingdoms,

which become hereditary in inteſtate ſucceſſion by accident, as in kingdoms, which are made hereditary by the free conſent of the people.

Rules of ſimply hereditary ſucceſſion.

VIII. It will be needleſs to enquire what the order of ſucceſſion is, where the law has exactly pointed it out. But if the law has done nothing more, than make the kingly power hereditary in inteſtate ſucceſſion, by tranſmitting it to the heirs of the laſt poſſeſſor of it without allowing him to diſpoſe of it by will or by any other act of his own; we are then to enquire what will be the natural operation of ſuch a law.

Hereditary ſucceſſion, as we have before obſerved, is either ſimple or lineal. [o] Grotius indeed does not give the name of hereditary ſucceſſion to the latter ſort. But we ſhall find preſently, that lineal ſucceſſion is hereditary in its own nature, and differs from ſimple ſucceſſion only in reſpect of the order, in which the heirs are placed.

The ſucceſſion is ſimply hereditary, if, upon the death of the laſt poſſeſſor of the kingly power, thoſe perſons, who are neareſt to him in blood, ſtand firſt in the order of ſucceſſion, and all, who are equally near to him in blood, have an equal right to ſucceed him.

[p] Our authors firſt rule about kingdoms which are made ſimply hereditary in inteſtate ſucceſſion by the free conſent of the people, is, that ſuch kingdoms are indiviſible. But this rule, as we have already proved, is not peculiar to kingdoms of this ſort: it extends to patrimonial kingdoms, whether they are diſpoſed of by any act of the laſt poſſeſſor before his death, or become hereditary in inteſtate ſucceſſion for want of ſuch a diſpoſition.

[o] Ibid. § XXII [p] Ibid. § XIV.

[p] Secondly;

[q] Secondly; where the civil law calls the head of any family to the ſucceſſion, and makes the kingly power hereditary in his family; no perſons come within the view of this law, beſides ſuch as are deſcended from him. His collateral relations by affinity or by blood cannot claim to ſucceed to what was given to him for his perſonal qualities, and to his family after him either as a reward of his merit, or upon the proſpect, that the like perſonal qualities would be cultivated in that family. Therefore if his direct deſcendents fail, the power, with which he was inveſted, reverts to the body of the ſociety; notwithſtanding there ſhould be ſome collateral branches left, that deſcended originally from the ſame ſtock with him.

[r] Thirdly; his deſcendents, if they are not born in ſuch marriage, as the laws of the country have eſtabliſhed, cannot claim to ſucceed him by the aid of the law. A perpetual contract of cohabitation in any other form, though it might be a valid marriage by the law of nature, is not ſufficient to give them ſuch a claim: both becauſe they will be liable to contempt upon their mothers account, if ſhe was not thought a fit perſon to be received as the wife of their father according to the matrimonial laws of the country; and likewiſe becauſe the ſtate, which has fixed the ſucceſſion, has a right to as great a degree of certainty, as the nature of the thing will allow of, that the perſon, who ſucceeds to the crown, is not ſpurious; and this degree of certainty cannot be had in the view of the civil law, unleſs the marriage of the parents is conformable to this law.

[s] Puffendorf obſerves farther, that in order to take away all ſuſpicion of a ſuppoſititious birth, it is the

[q] Ibid. § XV. [r] Ibid. § XVI. [s] B. VII. C. VII. § XII.

cuſtom in ſome countries for the queens to be delivered in an open chamber before a large aſſembly of the nobility or other principal perſons of both ſexes.

Fourthly; [t] amongſt thoſe, who are equally near in blood to the laſt poſſeſſor of the kingly power, the males are to be preferred to the females. The reaſon of this rule has been mentioned before: in this caſe, as in all others, which are not provided for by the expreſs directions of the law, regard is to be had to the common intereſt of the ſociety in interpreting ſuch laws, as relate to the civil government and in determining their operation: and the preſumption is, that the males are generally better qualifyed than the females, not only to defend the ſociety in times of war, but likewiſe to contrive for its benefit in times of peace.

Under this fourth rule Grotius has occaſion to mention ſubſtitution, which is an act of the civil law, that brings the child into the place of his deceaſed parent. We ſhall find preſently, that ſubſtitution is of two ſorts. But the ſort, which takes place in ſimply hereditary ſucceſſion, only makes the child by fiction of law as near in blood to the grandfather or other anceſtor, as the deceaſed parent would have been, if he had been living, that is, it places the child in the ſame degree of proximity to ſuch anceſtor, that the deceaſed parent ſtood in before his death. Thus ſuppoſe, that the laſt poſſeſſor of a kingdom had any number of ſons and daughters, that one of theſe ſons died before him, and that the ſon, who died, left a child, which will in courſe be the grandchild of the laſt poſſeſſor: then if the civil law has eſtabliſhed ſubſtitution, this grandchild will ſtand in the ſame degree of proximity to the grand-

[t] Grot. Ibid. § XVII.

father

father by the act of the law, that his parent ſtood in by nature. From hence it follows, that in determining the operation of a civil law, which eſtabliſhes ſimply hereditary ſucceſſion, we are to conſider, whether the laws of the country have introduced ſubſtitution or not. If ſubſtitution is not allowed of, the ſurviving children of the laſt profeſſor of the kingly power are nearer to him in blood than the grandchild; ſo that they will ſtand before the grandchild in the ſucceſſion, and amongſt them the males will ſtand firſt. But if the law has introduced ſubſtitution, the grandchild and the children will be in the ſame degree of proximity; and conſequently as the kingly power can deſcend only to one of them, if the grandchild ſhould be a male, and the children females, it would deſcend to the grandchild, and not to one of the children.

Fifthly; [v] in ſimply hereditary ſucceſſion, amongſt the male deſcendents, who are in the ſame degree of proximity either by nature or by ſubſtitution, or if there are no males then amongſt the females, the eldeſt will ſtand firſt in the ſucceſſion: becauſe, where other circumſtances are equal, that perſon, who has the advantage of age, is preſumed to be of more perfect judgment than the reſt, and upon this account to be more fit for the buſineſs of government: or if all of them are too young to be fit for this important buſineſs juſt now; yet the perſon, who has the advantage of age, will be ſooner fit for it than the reſt.

It is poſſible, that one perſon may have the advantage of age, whilſt another has the advantage of ſex; that is, one of the female deſcendents may be older than any of the males: the queſtion then would be,

[v] Ibid. § VIII.

which of theſe two ought to ſtand firſt in the order of ſucceſſion; whether the preference is to be given to the female on account of her age or to the male on account of his ſex? Grotius replys, that the advantage of ſex is perpetual; whereas the advantage of age is only temporary. Though the male claimant ſhould not happen to be at preſent as mature in judgment as the female, yet he will be as mature after ſome time: whereas the female can never obtain that advantage, in reſpect of the buſineſs of government, which the male derives from his ſex. Since therefore a perpetual advantage is to be preferred to a temporary one; our author determines the queſtion in favour of the younger male.

Lineally hereditary ſucceſſion what.

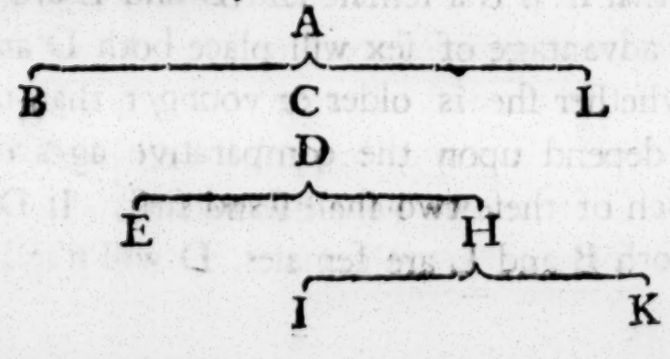
IX. The ſubſtitution, that we have been ſpeaking of, is of the imperfect ſort; it only brings the child into the ſame degree of proximity with the deceaſed parent in reſpect of the parents father, who is the childs grandfather; and then leaves ſuch child, as to the order of ſucceſſion, in the ſame place, which its own ſex or its own age gives it. But perfect ſubſtitution goes farther, and brings the child in all reſpects into the place of its deceaſed parent: the law by this ſort of ſubſtitution looks upon the child not only to be as near to its grandfather, as its deceaſed parent was, but likewiſe puts it into the ſame place, that its parent was in, as to the order of ſucceſſion.

Hereditary ſucceſſion, which would be ſimple, if the civil law of the country only allowed of imperfect ſubſtitution, will become lineal by means of perfect ſubſtitution. Where ſovereignty is tranſmitted according to the order of ſimple inheritance, the eldeſt ſon of the perſon, who was in poſſeſſion of it, will ſucceed to it upon the death of his father, if he ſurvives his father. But if he dies before his father, and his children are brought

brought into his place only by imperfect ſubſtitution, though the law will look upon them to be as near to their grandfather as their father was, it will not bring them fully into his place, or will not give them the ſame rank in the order of ſucceſſion, that he had: their uncles and aunts, who are the children of their grandfather by blood, will have the ſame legal right to ſucceed to their grandfather upon his death, that they have, who are conſidered as his children by legal ſubſtitution; and amongſt the equal claimants the eldeſt male, whether it is a younger ſon, or a grandſon by the eldeſt ſon, will ſtand firſt in the order of ſucceſſion. But perfect ſubſtitution brings the children of the eldeſt ſon fully into their fathers place upon his death; it makes them in all reſpects the perfect repreſentatives of their father, and conſequently gives them the ſame rank in the order of ſucceſſion, that he had. It produces the ſame effect in reſpect of his grandchildren or other remoter deſcendents, that is, in reſpect of the whole branch or line, which is derived from him. As he therefore, if he was alive, would ſtand before his younger brothers; ſo his whole line, his children, and grandchildren, and other remoter deſcendents, whether they are males or females, will ſtand before their brothers and all their deſcendents. In this eldeſt line the males upon every deſcent will be preferred to the females, who are in the ſame degree or ſame part of the line; and amongſt the males, the eldeſt will be preferred to the reſt; as they are in ſimple ſucceſſion: for the only difference between ſimple and lineal ſucceſſion is what ariſes from the difference between imperfect and perfect ſubſtitution: and when we have allowed for this difference, both ſorts of ſucceſſion are governed by the

ſame rules. Thus by means of perfect ſubſtitution and of a conſtant preference given to the eldeſt ſon, where there is any ſon, the inheritance will upon every deſcent be tranſmitted in the line, which is derived from the eldeſt ſon, as long as there are any deſcendents in this line, without paſſing to the younger ſons or to any of their deſcendents. If it ſhould happen, that in any part of this line there are no male heirs, the inheritance will not paſs from thence into any other line, in which there are male heirs, but the females, being brought by ſubſtitution into the place of their male anceſtor, will inherit, and amongſt theſe the eldeſt will ſtand firſt, as in ſimple ſucceſſion; and then the inheritance will be tranſmitted to the eldeſt male line, which is derived from her, or if ſhe has no male iſſue, then to the eldeſt female line. When no iſſue either male or female is left in the eldeſt line, the inheritance paſſes into the next line: but in determining which is the next line, we are to go no farther than to a line, which is derived from the ſame immediate anceſtor with the laſt poſſeſſor, if there is any ſuch line: for ſince perfect ſubſtitution brings all the deſcendents of this anceſtor fully into his place, the ſeveral lines, which are derived from him, will ſtand in the ſucceſſion, as he did, that is, before all his collateral relations, and before all the lines, which are derived from them.

Perhaps the following diagram may help to clear up this whole matter,



Firſt;

First; if A the poſſeſſor of ſovereign or other civil power has three children B C L, or any other number, of which B the eldeſt child is a daughter, and the two other children C and L are ſons; all theſe children are by birth in the ſame degree of proximity to A, or are equally near to him. And upon his death, if they all ſurvive him, and the law has made the power, which he poſſeſſed, hereditary, this power will be tranſmitted by the law to C the eldeſt male, either in ſimple or in lineal ſucceſſion.

Secondly; ſuppoſe C to die before A and to leave a ſon D; then if the law has not eſtabliſhed ſubſtitution of any ſort, B and L will be one degree nearer to A than D is; and upon the death of A, B and L will ſtand before D in the ſucceſſion; and of theſe two L upon account of his ſex will ſtand firſt. This is here. ditary ſucceſſion without ſubſtitution.

Thirdly; if the law has eſtabliſhed ſubſtitution, it brings the grandchild D into the place of its deceaſed parent C. But if the ſubſtitution is only of the imperfect ſort, the law only brings D into the place of C in reſpect of proximity to the anceſtor A, and not in reſpect of the order of ſucceſſion. Thus B D and L being in the ſame degree of proximity, B and L by birth and D by imperfect ſubſtitution; the eldeſt male amongſt them, or the eldeſt female if there is no male, will ſtand firſt in the order of ſucceſſion upon the death of A. So that if B is a female and D and L are both males; the advantage of ſex will place both D and L before B, whether ſhe is older or younger than they; and it will depend upon the comparative ages of D and L, which of theſe two ſhall ſtand firſt. If D is a male and both B and L are females, D will ſtand firſt by

by the advantage of his ſex, of whatever age he is. If there is no male L, and B and D are both females, then the comparative ages of theſe females will determine their reſpective places in the order of ſucceſſion. For though D by the ſuppoſition is a grandchild of A by an eldeſt ſon C, yet imperfect ſubſtitution, which brings D into the place of C, only in reſpect of proximity to A, does not give the grandchild D that place, which its father had in the order of ſucceſſion, but leaves D in the place or rank, which its own ſex and age will give it, when compared with the ſex and age of B and L, who are as near to A by birth as D is by ſubſtitution. This is the form of hereditary ſucceſſion with ſubſtitution of the imperfect ſort.

Fourthly; if the laws of the country eſtabliſh perfect ſubſtitution, the order of hereditary ſucceſſion will then be lineal. D the grandchild of A by the eldeſt ſon C, will upon the death of C be brought by perfect ſubſtitution into the place of C in all reſpects: the law, by conſidering D as the perfect repreſentative of C, brings D not only into the ſame degree of proximity to A, in which C ſtood, but likewiſe into the ſame place in the order of ſucceſſion. Therefore upon the death of A, the inheritance will by this perfect ſubſtitution be tranſmitted to the grandchild D, in preference to either B or L, as it would have been tranſmitted to C, if C had been alive; notwithſtanding D ſhould be a female and either B or L ſhould be a male; or notwithſtanding D ſhould be a younger male, than either B or L. For perfect ſubſtitution, when it has brought the grandchild D into the ſame degree of proximity to A, in which the deceaſed parent C ſtood, does not leave D to take that place in the order of ſucceſſion,

ceſſion, which its own ſex or its own age would give it in this degree of proximity, but gives it in all reſpects the place of its parent C. By the ſame ſort of ſubſtitution all the deſcendents of C, that is, the whole branch of the family, or the whole line, which is derived from C, will be brought up into the place of C, in the ſame manner with D: and conſequently all the deſcendents in this line will ſtand before B and L in the order of ſucceſſion, and before all their deſcendents. The inheritance upon every deſcent will be tranſmitted in the ſame order. The eldeſt ſon will ſtand before all the other children of the ſame family, if he is alive, as he would in ſimple ſucceſſion; and his children, if he is dead, will in lineal ſucceſſion be brought by perfect ſubſtitution into his place, and the inheritance will be tranſmitted to them, as it would have been to him; and the eldeſt male, or, if there is no male, the eldeſt female amongſt them, will ſtand firſt. E and H, the immediate deſcendents of D, are in the ſame degree or ſame part of the eldeſt male line, which is derived from C; that is, they are children of the ſame parent in this eldeſt male line; and amongſt theſe the eldeſt male will ſtand firſt, as in ſimple ſucceſſion. If therefore E the eldeſt child is a daughter, and H the younger child is a ſon, the inheritance will be tranſmitted to H and to the line, which is derived from him. But if H the ſon was to die without iſſue, the inheritance would be tranſmitted to E the daughter. Or if E and H are both daughters, then the inheritance will be tranſmitted to E, who is the elder. Upon either of the events laſt mentioned, or upon others of the like ſort, where there is a failure of male iſſue in the eldeſt male line, the inheritance will not paſs from

thence

thence into any younger male line derived from L, though there ſhould be male iſſue in this younger line: for E and H and all other children, if there are any other in this part of the line, derived from C and D, are brought by perfect ſubſtitution into the place of D; and though amongſt theſe children the eldeſt male, if there are any males, ſtands firſt, yet the females are only poſtponed, till there are no males; they are not excluded from the ſucceſſion. If E and H are both males, or if they are both females, ſo that E, who is the eldeſt of them ſtands firſt in the ſucceſſion; then upon the death of E without iſſue, the eldeſt line derived from D will be extinct, and the inheritance will paſs into the next line. But in determining which is the next line, we are to go back, not to any remote anceſtor A, but only to the next immediate anceſtor, from whom the line, that is extinct, and ſome other line, that is not extinct, were derived. If therefore the line E, which is ſuppoſed to be exhauſted, and ſome other line H, which is not exhauſted, but has the heirs I and K in it, were both derived from ſome immediate anceſtor D, the inheritance will paſs into the line H, and not into any other line B or L, which was derived from ſome remoter anceſtor A. For all the deſcendents of the immediate anceſtor D are brought by perfect ſubſtitution into his place in the order of ſucceſſion; and conſquently as he ſtood before any of his collateral relations B or L, ſo his deſcendent H will ſtand before them, and before any of their deſcendents.

In any country, where the law has made the ſucceſſion to kingly power hereditary, [w] Grotius informs

[w] Ibid. § XXII.

his

his readers by what means they may be enabled to judge, whether this ſucceſſion is of the ſimple or of the lineal ſort. If the written law of the country has expreſsly declared what ſort of hereditary ſucceſſion it deſigned to eſtabliſh; there can be no room to doubt about this matter. Or if the written law has only eſtabliſhed hereditary ſucceſſion, and has not declared of which ſort it ſhall be; we muſt be guided by the unwritten law of cuſtom or uſage. It can ſcarce be ſuppoſed, in any ſtate, where a monarchy, either abſolute or limited, and an hereditary ſucceſſion to the kingly power have been long eſtabliſhed by law, that there has been no cuſtom or uſage relative to the deſcent of kingly power, which will determine whether it is to deſcend in ſimple or in lineal ſucceſſion. But if ſuch a caſe ſhould happen, we are then to conſider, what ſort of ſucceſſion obtains in other indiviſible inheritances. Where titles of honour, which are incorporeal things, are indiviſible inheritances, and where land, when it deſcends in inteſtate ſucceſſion, is an indiviſible inheritance, if the law, which makes them hereditary, tranſmits them according to the order of lineal ſucceſſion, this is an evidence, that the law, whenever it ſpeaks of hereditary ſucceſſion, means lineal and not ſimple ſucceſſion. Grotius adds, that if the child of an eldeſt ſon, has the ſame rank or precedence in all public aſſemblies upon the death of its father, that the father would have had, if he had been alive, this ſhews us, that the child is brought by perfect ſubſtitution into the place of his father, and conſequently that the legal ſucceſſion is of the lineal ſort.

[x] Lineal ſucceſſion may be either cognatic or agnatic. The engliſh reader ſhould here be told, that all the

[x] Ibid. § XXIII.

kindred

kindred of a man, or all, who are derived from the ſame ſtock with himſelf, whether by a male or by a female line, are included in the general meaning of the latin word *cognati:* whereas thoſe only, who are derived from the ſame ſtock by a male line, are included in the word *agnati.* From hence he will underſtand, that the lineal ſucceſſion, which we have been deſcribing, is cognatic; as it calls all the deſcendents in the eldeſt line to the inheritance, whether they are males or females; though it poſtpones the females, and calls the males to the inheritance before them, in the ſame part of this line. But all females, and all who are derived from females, are excluded from the inheritance in agnatic lineal ſucceſſion. Therefore in cognatic ſucceſſion the inheritance will not paſs out of the eldeſt line into the next, as long as any iſſue, whether male or female, remains in the eldeſt. But in agnatic ſucceſſion it will paſs out of the eldeſt line into the next, when all the males, who are derived from males, are exhauſted in the eldeſt, though there ſhould be females or males derived from females ſtill remaining in it.

The operation of civil law, where it eſtabliſhes lineal ſucceſſion, is explaned by [y] Grotius in a different manner. He agrees with us in maintaining, that in ſimple ſucceſſion the law gives the immediate heir only an expectancy of ſucceeding to the kingdom, and that this expectancy never amounts to a perfect right, till the death of his anceſtor brings him into actual poſſeſſion. But then he contends, that in lineal ſucceſſion the immediate heir of a kingdom, though he cannot have poſſeſſion of it in fact, till the death of his anceſtor, has poſſeſſion of it in law, as ſoon as he is born; that

y Ib. § XXII.

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the law firſt changes his expectancy into a perfect right of ſucceeding to the kingdom, and then conſidering this perfect right, as if it was poſſeſſion, tranſmits it upon his death from him to his deſcendents, not only if he ſurvives his anceſtor and ſo comes into poſſeſſion in fact, but likewiſe if he happens to die before his anceſtor, and ſo never has poſſeſſion in fact at all. We ſhall be able to judge, whether the law operates in this manner, if we examine ſome of the effects, which are produced by it. Let us ſuppoſe the poſſeſſor of a kingdom to have two or more daughters; the eldeſt of them, if there was no ſon born before her, is, at the time of her birth, the expectant heir; where the law has eſtabliſhed cognatic lineal ſucceſſion: and if no ſon is born afterwards, ſhe will ſucceed her father in the kingdom. Shall we ſay here, that this eldeſt daughter has poſſeſſion of the kingdom in law from the hour of her birth, that the law changes her expectancy into a perfect right, and will tranſmit this right to her iſſue, whenever ſhe dies? If we ſay this, the conſequence will be, that notwithſtanding there ſhould be a ſon born after her, yet this eldeſt daughter will take the inheritance before him: for the ſame law, which had improved her expectancy into a perfect right of ſucceſſion, before he was born, cannot defeat this right afterwards by calling him to the inheritance inſtead of her. And thus a female would be placed before a male of the ſame degree by ſuch an operation of law, as Grotius deſcribes. Or ſhall we ſay on the contrary, that the law does not improve her expectancy into a right, becauſe it is only an eventual expectancy, and may be defeated by the birth of a ſon? If we take this part of the alternative, the conſequence will be, that ſhe never can

have a perfect right at all, as long as her father lives; becauſe ſo long the birth of a ſon is a poſſible event. Let us therefore ſuppoſe farther, that this eldeſt daughter dies before her father and leaves iſſue, and that her father dies afterwards without having a ſon; then in the uſual courſe of cognatic lineal ſucceſſion one of her children will ſucceed her father in the kingdom in preference to her ſiſters and to all their deſcendents. But the law certainly does not produce this effect by giving her a perfect right to the ſucceſſion and by tranſmitting this right to her children upon her death: for it was granted from the beginning, that the law gave her no ſuch right, and conſequently it muſt be granted likewiſe, that no ſuch right could be tranſmitted from her to them.

But the common rules of ſimple ſucceſſion with the help of perfect ſubſtitution will explane this whole matter. Though all the daughters are expectant heirs of their father, yet only one of them can inherit the kingdom; becauſe it is an indiviſible thing: and the advantage of age will give the preference to the eldeſt. The law therefore, by making the kingdom hereditary, will tranſmit it to her upon the death of her father, if he dies poſſeſſed of it and has no ſon, and ſhe ſurvives him. Or if ſhe dies before him and leaves iſſue, perfect ſubſtitution will bring this iſſue up into her place and will enable it to take the inheritance, as ſhe would have taken it, that is, before any of her ſiſters. Or laſtly, if there ſhould be a ſon born after her, this ſon will be an expectant heir amongſt his ſiſters, and the advantage of his ſex will place him before them all, and before all their deſcendents, in the order of ſucceſſion.

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We may try, whether our authors principle would produce the proper effects of lineal ſucceſſion in another example. When the poſſeſſor of a kingdom, where lineal ſucceſſion is eſtabliſhed, has a brother; this brother will have an expectancy of ſucceeding him in the kingdom, as long as he has no children. But the law cannot from the firſt improve this expectancy into a perfect right of ſucceſſion: becauſe if it did, the brother would ſtand in the order of ſucceſſion before any children of the king, that might be born afterwards. Upon our authors principles this conſequence, as inconſiſtent as it is with the order, in which the heirs are placed in lineal ſucceſſion, cannot be avoided, without affirming, that the expectancy of the brother is not improved by the law into a right of ſucceſſion, till it appears, that the poſſeſſor of the kingdom will have no children. And this anſwer, whilſt it removes one difficulty, will bring on another. It cannot appear with any certainty, whether he will have children or not, till he is dead; ſo that in the mean time his brother cannot have a perfect right of ſucceſſion. From hence it will follow, that, if he ſhould have no children, the law, which makes the kingdom hereditary in lineal ſucceſſion, cannot operate in ſuch a manner, as Grotius imagines. For upon this event the brother will be the heir in lineal ſucceſſion; and yet he never has a perfect right of ſucceſſion, or a poſſeſſion of the kingdom in law, till the law tranſmits the inheritance to him upon the death of the laſt poſſeſſor and gives him poſſeſſion in fact. This example may be varyed a little by ſuppoſing, that the brother has iſſue, and that the poſſeſſor of the kingdom ſurvives him, but dies without iſſue. The inheritance will then deſcend

in lineal ſucceſſion to the iſſue of the brother. But we ſhould be at a loſs to explane this deſcent upon our authors principles. We cannot ſay, that the brother before his death had a perfect right of ſucceſſion, and that the law tranſmits this right to his children, as if it had actually taken effect, or as if he had been in poſſeſſion of the kingdom; becauſe the conſequence of this would be, what has been mentioned already, that the brother in virtue of this perfect right would have ſtood firſt in the order of ſucceſſion, whether the laſt poſſeſſor had iſſue or not. Nor can we ſay conſiſtently with our authors principles, that the law will call the iſſue of the brother to the inheritance, if the laſt poſſeſſor dies without iſſue, though it had given the brother no perfect right of ſucceſſion, and could therefore tranſmit no perfect right from him to his iſſue: becauſe our author imagines, that the proper operation of a law, which eſtabliſhes lineally hereditary ſucceſſion, conſiſts in giving the expectant heir ſuch a right, whilſt he lives, and in tranſmitting it to his iſſue, when he dies.

This caſe may be explaned, as the other was, by the common rules of ſimple ſucceſſion with the help of perfect ſubſtitution. If the poſſeſſor of a kingdom dies without iſſue, his brother will be called to the inheritance according to the common rules of ſimple ſucceſſion; though till this event happened he had only an expectancy, and no perfect right of ſucceſſion, or no poſſeſſion of the kingdom in law. His children are upon his deceaſe brought into his place by perfect ſubſtitution, where the ſucceſſion is lineal; the inheritance therefore will deſcend to the eldeſt male amongſt them, as it would have deſcended to him, if he had been alive. And thus

thus upon the death of the preſent poſſeſſor of the kingdom without iſſue, the law will give the inheritance to this eldeſt male, though it had before given him only an expectancy of ſucceeding, and had not improved this expectancy into a perfect right of ſucceſſion.

Effect of abdication in lineal ſucceſſion.

X. We may now return to the queſtion, which made it neceſſary for us to take this view of the operation of civil law in ſucceſſion to kingdoms.

When [z] Grotius contends, that the abdication of the anceſtor will not affect the heir, where the law has eſtabliſhed lineal ſucceſſion, the reader ſhould obſerve, that he does not ſuppoſe a divine hereditary right, which cannot be defeated by any human act whatſoever, to be inherent in the heir. A right of this ſort is inconſiſtent with his whole opinion about the origin of civil ſociety, and the nature of civil government. He argues therefore only from a right, which he ſuppoſes to be veſted in the heir by the operation of civil law, where this law has eſtabliſhed lineal ſucceſſion, and contends, that this is ſuch a right, as the abdication of the anceſtor will not defeat. In kingdoms of ſimply hereditary ſucceſſion he grants, that the abdication of the anceſtor will cut the heir off from the ſucceſſion; becauſe where the anceſtor has relinquiſhed his intereſt in the kingdom, or his legal right of civil government, in his life-time, he cannot tranſmit that intereſt or right to his heir. But in lineal ſucceſſion, he maintains, that the heir has a perfect right of ſucceſſion given to him by the law, as ſoon as he is born, and conſequently that the abdication of the anceſtor cannot affect this right, which he thus derives from the law. But we

[z] Ibid. XXVI.

have juſt now ſhewn, that the heir in lineal ſucceſſion has no other ſort of right, than the heir in ſimple ſucceſſion; that as the heir in ſimple ſucceſſion has only a legal expectancy, during the life of the anceſtor, ſo in lineal ſucceſſion he has only the like expectancy: for theſe two ſorts of ſucceſſion do not differ from one another in reſpect of the right, which the law gives to the heir, but in reſpect of the ſubſtitution, which the law eſtabliſhes. Where the law has made the kingdom hereditary; if it admits of no ſubſtitution at all, or only of imperfect ſubſtitution, the ſucceſſion will be ſimple: but if it admits of perfect ſubſtitution, the ſucceſſion will be lineal. Since therefore upon the abdication of the anceſtor the ſovereignty or the regal power will not devolve upon the heir in ſimple ſucceſſion, during the life of his anceſtor, the conſequence is, that upon the like event it will not devolve upon the heir in lineal ſucceſſion. And thus in either caſe a vacancy will be made in the throne, and the people will be at liberty to change the conſtitution. Upon the abdication of the anceſtor, perfect ſubſtitution will not operate ſo as to bring the heir immediately into his place and fill the vacancy, before his death. For perfect ſubſtitution is in this reſpect like imperfect ſubſtitution; it brings the heir into the place of the anceſtor only upon the death of the anceſtor, and not before.

When a kingdom is reſigned with the conſent of the people, the heir may ſucceed to it immediately, whether the kingdom is ſimply or lineally hereditary. But this effect is brought about, not by the operation of any former law, that may have made the kingdom hereditary, but by the poſitive conſent of the ſociety obtained

obtained upon this occaſion and for this purpoſe. In an abſolute monarchy, the immediate conſent of the collective body of the ſociety is neceſſary thus to bring the heir into the place of his anceſtor upon a reſignation. But in limited monarchies, where the body of the ſociety acts in the legiſlative by repreſentatives or otherwiſe, the conſent of the legiſlative body will be ſufficient: for in ſuch forms of government this is a change only of the civil law, that regulates the ſucceſſion, and not of a fundamental law of the conſtitution.

Change of conſtitution upon breach of compact.

XI. In thoſe ſtates, where the conſtitution has divided the ſupreme power between the king and the people, [a] Grotius allows, that the people have a right to reſiſt the king by force, when he invades their part of this power; and then he goes on to obſerve, that in a civil war, which is thus occaſioned, the king may loſe his part of the ſupreme power by the right of war, and conſequently that the conſtitution may be thus changed. The right of war, which he here ſpeaks of, certainly cannot be ſuch a right, as he elſewhere ſuppoſes to have been introduced by a purely poſitive law of nations. For if there is any ſuch law, the rights, which are derived from it, can only take place where nations are the parties in the war: a law of nations, whether it is purely poſitive or not, relates only to nations in their intercourſe with one another, and produces no rights or obligations amongſt the parts or members of the ſame nation. [b] Indeed his whole opinion about a purely poſitive law of nations, and a right of war ariſing out of it, is without foundation. War of all ſorts is governed by the law of

[a] L. I. C. IV. § XIII. [b] See B. II. C. IX. § I. III.

nature only; whether it is a ſolemn one between different nations, or a civil one between different parts of the ſame nation. No right therefore either to corporeal or to incorporeal things can be acquired by taking them in war, unleſs it is acquired by the aid of the law of nature. But ſince war is only the uſe of force, the mere taking of a thing in war can give us no right to it; becauſe by the law of nature no effects of right are produced by mere force. If the thing, which we take, was our own before, and we were unjuſtly kept out of the poſſeſſion of it; our right to the thing may be maintained, and the poſſeſſion of it may be recovered, by war: but if we had no ſuch antecedent right ariſing from ſome other cauſe, the mere right of war is no right at all. The conſequence of this is, that in ſhewing how a limited monarch, who has invaded that part of the ſovereign power, which the conſtitution has reſerved to the people, may in a civil war be deprived of the other part, which the ſame conſtitution had granted to him, we muſt look farther than a mere right of war, and muſt enquire, whether the people in theſe circumſtances have not an antecedent right to take it from him. Now that part of the ſovereign power, which the monarch has, was granted to him at firſt by the compact, which ſettled the conſtitution, and is holden by him afterwards under the ſame compact. As long therefore as the obligation of the conſtitutional compact continues, he has a right to this part of the ſovereign power; and the people have no right to take it from him, either by war or by any other means, without his conſent. But by wilfully and notoriouſly invading the other part he breaks the conſtitutional compact. And this compact is ſo far like all other compacts, that a violation

tion of it on his ſide will leave the people at liberty to chuſe, whether they will abide by it or not. A compact, when it is violated by one of the parties, is uſually ſaid to be void; but if we ſpeak accurately we ſhould rather ſay, that it may be made void at the diſcretion of the other party. Perhaps in the inſtance which is now before us, thoſe, who diſlike monarchical governments of all ſorts, may think, that the people will ſuffer no inconvenience from a failure in the obligation of a compact, by which they had granted any part of the ſovereign power away from themſelves and had veſted it in a king. But it is not worth the while to debate this point with them in the preſent queſtion: becauſe whatever general rule the law of nature has eſtabliſhed in other compacts, the ſame rule will be applicable to this. And certainly it would in general be a hardſhip upon one of the parties in a compact, if the obligation of it was to be neceſſarily void, whenever the other party breaks the conditions of it: for by this means, if the latter did not chuſe to comply with any of the claims, which the compact has given to the former, he would have nothing elſe to do but to break the compact, and then theſe claims would ceaſe. This, as it is inconſiſtent with natural equity, is inconſiſtent likewiſe with natural reaſon: not only becauſe the party, who breaks a compact, might in many inſtances gain a benefit by his own injuſtice, if his breach of it would make it void; but likewiſe becauſe the obligation of a compact, though it ariſes from the joynt will of two parties, might be thus deſtroyed by the ſole will of one of them. However; it is ſufficient for our preſent purpoſe, that when the compact, by which the people have given their civil governour a

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part of the ſovereign power, is broken on his ſide, the obligation of it is voidable, or may be ſet aſide, at the diſcretion of the people. For it will follow from hence, that, as they are at liberty to continue the ſame conſtitution, and to leave him in poſſeſſion of his former power, if they can ſtop his uſurpations either by force or otherwiſe, ſo they are at liberty, if they think proper, to releaſe themſelves from the obligation of their former compact, and to make ſuch alterations either in the conſtitution, or in the perſons, who are to adminiſter it, as they ſhall judge to be convenient: they may reſtore the old form of government, and may call a different ſucceſſion of perſons, either of the ſame family or of another, to the throne; or they may change the conſtitution in part by ſetting new limitations to the power of their future kings, whether they continue the old ſucceſſion or introduce a new one; or laſtly they may change the conſtitution entirely by eſtabliſhing a new form of civil government. The people in making theſe changes may poſſibly meet with ſuch oppoſition, as will occaſion a civil war, and as cannot be ſurmounted without conqueſt. This is all that war and conqueſt have to do in the matter; they may be neceſſary to do that in fact, which the people had otherwiſe a right to do. Any of theſe changes therefore, if they can be made peaceably, will be made as effectually in right, as if war had made way for them and conqueſt had eſtabliſhed them. Though Grotius here ſpeaks only of mixed forms of government, theſe principles are equally applicable to deſpotic forms. We cannot indeed ſay, that the people in abſolute monarchies have any conſtitutional part of the ſovereign power. But in all forms of civil

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government they have a right to be free from all unſocial ſubjection: ſo that tyranny or unſocial oppreſſion, though it cannot in an abſolute monarchy be called an invaſion of the peoples part of the ſovereign power, will be an invaſion of a natural right, which is reſerved to them in the conſtitutional compact. Thus tyranny or unſocial oppreſſion even in deſpotic forms of government will be a breach of this compact, and will diſcharge the people from the obligation of it, if they think proper to be diſcharged.

When the people in a mixed form of government cauſeleſsly and unjuſtly invade that part of the ſovereign power, which they have granted and confirmed to their monarch by the conſtitutional compact; this act of the people cannot of right diminiſh his power, unleſs he conſents, that it ſhould be diminiſhed: becauſe the people cannot by their own act diſcharge themſelves from the obligation of the compact, that they have made with him. But in the mean time this act of the people, however injurious it may be, will not encreaſe his power, or will not give him a right to any more power, than the conſtitution had given him: for ſince the whole ſovereign power was originally veſted in the collective body of the ſociety, which I here call the people, he cannot of right claim any greater part of it, than the people have granted to him by compact in forming the conſtitution. There is a remarkable difference between the effect of the ſame wrong, when it is done by the monarch, and when it is done by the people. Upon any failure in the obligation of the conſtitutional compact, by which a part of the ſovereign power was granted to him, this part will revert to the people: becauſe it belonged to them originally, and is holden

holden by him under this compact. When he violates this compact on his ſide, it is voidable at the diſcretion of the people: and if they chuſe to make it void, his power reverts to them. On the other hand, when the people violate it on their ſide; it is voidable at his diſcretion: if he chuſes to abide by it, he has no right to any other power, than he derives from it: and if he chuſes to make it void; inſtead of gaining a greater part of the ſovereign power, he will loſe what he had, and it will, as in the other caſe, revert to the people. Thus the people may claim to change the conſtitution, when he invades their part of the ſovereign power; whereas he can only claim to continue the conſtitution, though the people ſhould cauſeleſsly and wrongfully invade his part. This is the whole of his right, and no event whatſoever can give him a more extenſive right, without the conſent of the people. If the ſtruggles between him and them ſhould end in a civil war, and victory ſhould declare itſelf on his ſide; yet conqueſt will not of right encreaſe his power, however ſtrongly we may put the caſe in his favour by ſuppoſing the breach of the conſtitution to have begun from the people, and the whole blame of the war to reſt upon them; for the uſe of force, though it ſhould be ſuperiour to the force, which is oppoſed to it, only ſerves to ſupport a right, which might otherwiſe have been hindered from taking effect; it does not produce a right, where there was none before.

Sameneſs of a ſtate in what it conſiſts.

XII. A number of men, though they happen to live near one another, to meet frequently, and to work or to travel together, will be only a herd or company of detached and independent individuals, till they have bound themſelves to one another by compact to act joyntly under

under the direction of their common underſtanding for the preſervation of their rights and the advancement of their general intereſt. The exiſtence of a ſtate begins from the ſocial compact: though the perſons, out of which it is formed, might exiſt, before they entered into ſuch a compact; it is this compact, that forms them into a civil ſociety. From hence we may eaſily diſcover, what it is that makes any one ſtate different from all others, and what it is that makes any one ſtate at different times the ſame with itſelf. Any one ſtate is different from all others; becauſe it had a different beginning of exiſtence, that is, becauſe it began from a different compact. And any one ſtate will at all times be the ſame with itſelf; becauſe it had the ſame beginning of exiſtence, that is, becauſe it began from the ſame compact.

[c] A ſtate in reſpect of its members is a fluctuating body; ſome of them are conſtantly falling off from it by death, and others are as conſtantly joyning themſelves to it: ſo that in a courſe of years all the members of it will be changed. But if this change is made gradually, the ſociety will remain the ſame: becauſe the ſocial compact is the ſame all the time, notwithſtanding ſuch a change is made in the perſons, who are the parties to it. In a gradual change, though ſome of the members fall off from the ſociety, yet the ſame compact ſubſiſts amongſt thoſe that remain; and the new members, who joyn themſelves to it, become parties in this compact. As others fall off, the ſame compact is ſtill kept up in the ſame manner, and will continue to be kept up, though all the old members will in a courſe of years be gone, and the ſociety will conſiſt

[c] Grot. L. II. IX. III.

wholly

wholly of new ones. Any ſubſequent changes, that are made in theſe new members, will affect the ſociety no otherwiſe than the former changes affected it. The perſons, who are parties in the ſocial compact, will be different; but the ſociety will continue the ſame: becauſe theſe different perſons are ſucceſſively joyned to it by the ſame compact. A ſociety therefore may be a perpetual body, notwithſtanding all the parts of it are mortal. It will continue, as long as the ſame ſocial compact is kept up; and this compact may be kept up for ever by a conſtant ſucceſſion of new members.

Several ways in which a ſtate may ceaſe.

XIII. This is the only ſenſe, in which a ſociety can be called a perpetual body. We call it a perpetual body, becauſe it may, and not becauſe it muſt, continue for ever. For though the ſame compact may be kept up for ever by a conſtant ſucceſſion of new members, yet there are ſeveral ways, in which it may poſſibly ceaſe; and whenever it ceaſes the ſociety periſhes.

[a] Firſt, if all the members of a ſtate are waſhed away by the ſea, or ſwallowed up in an earthquake, or put to the ſword at once; the ſociety will be deſtroyed. Where the members drop off gradually, and new ones joyn themſelves to the ſtate, before all the old ones are gone; the ſame ſocial compact is kept up by a ſucceſſion of different perſons. But where they all die at once, this compact muſt neceſſarily ceaſe; becauſe there is no ſucceſſion of perſons to keep it up. If the land, upon which the ſociety was ſettled, is left; as it will be, where all the members are put to the ſword; another company of men, who are united, as they were, into a civil ſociety, may ſucceed into their place by ſettling upon the ſame tract of land. But this

[a] Grot. Ibid. § IV. V. VI.

new

new company of men will be a different ſociety; they only ſucceed into the poſſeſſions of the old inhabitants, and not into the ſame ſocial compact, by which they were united. This compact ended with them; and it is a different compact, that unites the new inhabitants.

Secondly; a ſtate will ceaſe, if all the members of it are brought into perfect ſervitude. The ſocial compact is deſtroyed by the ſlavery of the parties in it: becauſe the obligations of ſlavery are inconſiſtent with the obligation of this compact. The members of a civil ſociety are obliged to act under the direction of the public underſtanding for the ſecurity of their rights and for the advancement of the general intereſt. But when the ſame perſons, who were members of ſuch a ſociety, become ſlaves, they are obliged to act in all things, as their maſter ſhall direct them to act, for his benefit. This latter obligation therefore ſets the former aſide by rendering it impoſſible.

Thirdly; a ſtate will ceaſe, if the members of it are ſo diſperſed, that they can neither be directed by a common underſtanding nor act joyntly with a common force for the purpoſes of civil union. If they are diſperſed by means of ſome external violence; the ſocial compact ceaſes; becauſe the matter of it is impoſſible. But if they have diſperſed themſelves by mutual conſent, this compact is diſſolved.

Fourthly; a ſtate will ceaſe, if it is ſubjected as a province to another ſtate. The ſocial compact had originally collected all the parts of it into one body and obliged them to act for the purpoſes of civil union under the conduct of their own common underſtanding. This compact therefore ceaſes, when the ſociety becomes a province: becauſe it then becomes an inferiour

riour or ſubordinate part of another ſociety, and though it is not obliged to purſue any other purpoſes, yet it is obliged to purſue theſe under the conduct of a foreign underſtanding.

The rights, which belong to a civil ſociety, fail or are loſt, when the ſociety ceaſes to exiſt. And upon the ſame event the members of it loſe their rights. But this is to be underſtood of thoſe rights only, which belonged to them as members of the ſociety, and not of thoſe, which belonged to them as individuals. The right, which each of them had to his life, to his liberty, to his lands, or to his moveable goods, and other rights of the ſame ſort, are not directly affected by the deſtruction of the ſociety, of which they were members, however they may happen to be remotely affected. In one caſe indeed the members of a ſociety, which is deſtroyed, loſe their perſonal liberty: but this loſs, inſtead of being produced by the deſtruction of the ſociety, is the cauſe, why the ſociety periſhes.

The ſame effect, that is produced by the deſtruction of a ſociety in the rights of the whole collective body and of its ſeveral members, will be produced likewiſe in their reſpective obligations. Thus the debts of a ſociety are cancelled, when the ſociety periſhes; and though the members, whilſt the ſociety ſubſiſted, were joyntly bound to contribute towards the payment of the public debts, this obligation will ceaſe, when the ſociety ſubſiſts no longer. But the deſtruction of the ſociety, does not cancel any debts, which the members of it had contracted as individuals upon their own private account.

Change of conſtitution does not change a ſtate.

XIV. A civil ſociety continues the ſame, notwithſtanding any changes that are made in its civil conſtitution

ſtitution. [c] When a monarchy is eſtabliſhed in a free ſtate, or when on the contrary a popular form of government is introduced inſtead of a monarchy, it is the conſtitutional compact that is changed, and not the ſocial compact.

In the language of the ſchools the eſſence of a ſtate conſiſts in its form. An union of men of free condition by compact for ſuch purpoſes, as we have already had frequent occaſion to mention, is the form of a ſtate. This union is certainly eſſential to a ſtate; for there can be no ſtate, where no ſuch union ſubſiſts, and wherever ſuch union does ſubſiſt, it produces a ſtate. Now a change of the civil conſtitution of a ſtate is a change of form in the ſtate. And this is ſometimes urged to prove, that a change of the civil conſtitution of a ſtate muſt be a change of the ſtate itſelf: becauſe a change of form is a change of eſſence. But the anſwer is obvious. A change of civil conſtitution is a change of the form of government in a ſtate, and not a change of the eſſential form of the ſtate itſelf. The ſeveral members of the ſtate, notwithſtanding the form of government is changed, ſtill continue to be bound by compact, as they were before, joyntly to purſue the purpoſes of civil union, and are ſtill parties in the compact, by which the ſtate was originally produced.

From hence it follows, that a ſtate neither loſes any of its rights, nor is diſcharged from any of its obligations, by a change in the form of its civil government.

XV. [d] When two ſtates unite themſelves into one by mutual agreement, ſo that the ſeveral parts or members of each are admitted alike to the ſame or to ſimilar privileges; neither of them becomes a province to

Some ſorts of changes in a ſtate do not deſtroy it.

[c] Grot. ibid. § VIII. [d] Grot. L. II. C. IX. § IX.

the other, and neither of them is deſtroyed, by this union. The members of each continue to be joyned to one another by ſocial compact, as they were from the firſt; and their original compact is only changed in part, it is not made void. The only change, that is made, conſiſts in enlarging the terms of this compact on each ſide, ſo that the members of each ſtate mutually receive the members of the other into the ſame body with themſelves.

Since both ſtates thus continue in this united body, and neither of them ceaſes to exiſt; the rights and the obligations of both will remain, and will become the rights and obligations of the united body; that is, whatever rights belonged to each ſtate ſeparately, before they were united, will afterwards be the rights of the collective ſtate; and the ſame obligations, that each ſtate was under ſeparately before, the collective ſtate will be under afterwards.

[e] In monarchies, whether they are abſolute or limited, two ſtates may accidentally have the ſame head. But this unity of head does not joyn the two ſtates into one. Each ſtate was originally formed by a different compact; and as long as no alteration is made in theſe compacts, either in whole or in part, the two ſtates will continue to be two diſtinct bodies. They are not made one merely by being in ſubjection to the ſame perſon: for he is called to govern each of them as a diſtinct ſtate from the other; and the appointment of him to govern them as two diſtinct ſtates cannot make them one. Neither has he by means of this appointment an authority to unite them without their direct conſent: for he is appointed by each to govern it as

[e] Grot. L. I. C. III. § VII.

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a diſtinct body; and ſuch an appointment cannot imply a power of joyning it to the other.

[f] Whilſt the ſame perſon thus governs two ſtates, one of them, as Grotius ſays, is not a province to the other, if he is called to govern each by two different appointments; whether theſe appointments are made by diſtinct elections, or by the diſtinct laws of ſucceſſion, that are eſtabliſhed in each. But if by being appointed to govern one he has an immediate right to govern the other, without the aid of any diſtinct election or any diſtinct civil law of the latter, then the latter is a province to the former.

[g] Though a number of ſtates ſhould have formed themſelves into a ſyſtem or aggregate body, in order to carry on and ſecure ſome particular purpoſe; it does not follow, that they are united into one ſtate. This union reaches no farther than the particular purpoſe, for which it was formed: and the ſeveral ſtates, after they are thus united, will continue to be as diſtinct from one another in all other reſpects, as they were before. Such an union does indeed diminiſh the independency of each ſtate: becauſe, as far as the purpoſes of it extend, each ſtate is no longer at liberty to chuſe and to act for itſelf without the concurrence of the others. But this diminution of independency, ſince it affects all of them equally, will not reduce any of them to the condition of provinces.

[h] When a ſtate by the general conſent of the whole body divides itſelf into two or more ſtates, it does not ceaſe. All the members of it, before this diviſion was made, were united by a ſocial compact into one body; and

[f] Grot. L. II. C. IX. § VIII. [g] Grot. L. I. C. III. § VII.

[h] L. II. C. IX. § X.

after it is made, all the members of each part continue to be united by the ſame compact. The diviſion only changes this compact in part and does not put an end to it. Before the ſtate was divided, the compact was ſo general, as to comprehend the individual members of all the parts: but in making the diviſion all the members of each part agree to make it leſs general and to include only themſelves in it.

But if the ſocial compact, by which the whole ſtate was once united, is only changed in part, and is not entirely deſtroyed, when the ſtate is thus divided; the rights and obligations of the whole ſtate will remain. If theſe rights and obligations have not been diſtributed amongſt the ſeveral parts by ſpecial agreement, the rights muſt be enjoyed, and the obligations muſt be fulfilled by all the parts in common.

Variable qualities of a ſtate.

XVI. Some qualities, which we uſually ſpeak of as if they belonged to a ſtate, are derived to it from the qualities of its individual members, and are ſaid to belong to the ſtate, only becauſe many of its members are endued with them. [1] Such qualities, as theſe, are variable; they may either be loſt or acquired, though the ſtate remains the ſame.

The integrity or the valour of a ſtate are qualities of this ſort: the ſtate loſes its integrity, when the members of it become perfidious, and loſes its valour, when they become cowardly and effeminate. But by means of a continued ſucceſſion of members united in the ſame ſocial compact, the ſtate itſelf, when it is perfidious and effeminate, is the ſame that it was before, whilſt it was faithful and valiant.

The ſame thing happens in other ſocieties, that are continued by a ſucceſſion of different parts, as well as in

[1] Grot. L. II. C. XXI. § VIII.

civil

civil ſocieties: though the ſocieties continue to be the ſame, the qualities, which they derive from the qualities of their members, may be changed. The ſame ſociety, which is a learned one now, may hereafter be an illiterate one: the learning of the ſociety is only the learning of its members; it will therefore loſe this quality, whenever it is filled with illiterate members. Mankind are indeed very ready to claim a ſhare in the credit of their predeceſſors: and for this reaſon, in ſpeaking of any ſociety, of which we are members, we are apt to take in the whole compaſs of its exiſtence, and to call it a learned or a valiant ſociety; if its members in any former period of time have been poſſeſſed of theſe good qualities; though few or none of them ſhould be poſſeſſed of the ſame qualities now. But where the change has been made the other way, we ſeldom deceive ourſelves in the ſame manner. When the ſociety, to which we belong, is become learned or valiant, we look no farther back than the preſent times in ſpeaking of it, and are apt to complain, if any one ſhould ſo far impute the bad qualities of our predeceſſors to us, as to call it an illiterate, or an effeminate and cowardly ſociety, only becauſe it was ſuch in the time of ſome of our predeceſſors.

We may reckon guilt amongſt the other variable qualities of a ſtate. A diſpoſion to do harm belongs primarily to the individual members, and is no otherwiſe a quality of the body, than as the body derives this quality from its members. From hence it follows, that a ſtate cannot juſtly be puniſhed now for any crime, that it committed in ſome remote period of time. Where there is no guilt, the law of nature does not allow any puniſhment to be inflicted. No puniſh-

ment therefore can juſtly be inflicted upon a ſtate, after none of the members of it, that committed the crime, are left; becauſe in reſpect of that crime the guilt of the ſtate ceaſes, as ſoon as theſe members are gone.

But the obligation of a ſtate to make reparation for the damage, that it has done, will continue, till reparation is made; though none of the perſons, who were concerned in doing the damage, remain in it. Guilt, as it is a perſonal quality, ceaſes with the perſons of the criminals and does not deſcend to their ſucceſſors. But the obligation to repare damage affects the goods of thoſe, who have done the damage, and conſequently deſcends to their ſucceſſors along with the goods.

Conqueſt in an unjuſt war produces no effects of right.

XVII. Nations, which are conquered in war by a foreign enemy, are ſometimes reduced to provinces, or if they continue to be diſtinct ſocieties, they are ſometimes compelled to receive ſuch a form of civil government, or ſuch civil governours, as the conqueror thinks fit to impoſe upon them. Theſe are the effects, which conqueſt in war produces in fact, whether the war is juſt or not. But ſome of the plaineſt principles of the law of nature will ſerve to ſhew us, that conqueſt in an unjuſt war produces no effects in right. Conqueſt is only the ſuppreſſing of a force, which is uſed againſt us, by the uſe of a ſuperiour force on our ſide. But all unjuſt war is only the uſe of unjuſt force: and the law of nature gives no effects of right to unjuſt force, though it ſhould happen to be ſuperiour to the force, which is oppoſed to it.

We might perhaps find reaſon to determine otherwiſe upon this queſtion; if there was any purely poſitive law of nations, by which all public wars, or how-

ever

ever all ſolemn wars, were rendered externally juſt, as to their effects, and by which the captors might claim whatever they can get into their poſſeſſion in ſuch wars, whether they are internally juſt or not. But we have [l] already proved, that there is no ſuch law. And certainly the effects, which conqueſt even in an unjuſt war ſometimes produces in fact, may be accounted for without ſuppoſing, that all nations have ever eſtabliſhed ſuch a law by general conſent. The deſire of power or of profit leads the conqueror to get whatever he can into his poſſeſſion, and to keep whatever he has gotten. The vanquiſhed nation ſubmits to his will, becauſe it is not able to make an effectual reſiſtance. And if neutral ſtates do not find, that their intereſt is concerned to ſtop the growing power of the conqueror, they are not likely to hazard their own ſafety and the lives of their members, by engaging in the quarrel of the vanquiſhed nation and aſſiſting it to repel or to throw off his unjuſt uſurpation. Thus the ambition or the avarice of one party, the weakneſs of another, and the caution of a third, will explane the events of conqueſt, without ſuppoſing, that any purely poſitive law of nations has given the conqueror a right to dominion, has obliged the vanquiſhed ſtate to ſubmit to him, and has reſtrained all other ſtates from affording it relief.

What effects may be occaſioned by conqueſt in a juſt war.

XVIII. The ſame principles may be applyed to conqueſt univerſally; even though it is obtained in a juſt war. We cannot ſay, that a conqueror can have no right of civil dominion; merely becauſe he comes in by force at firſt, and continues to hold his power by force afterwards. [m] If he has ſuch a right ariſing from ſome other cauſe, the law of nature will allow

[l] See C. IX. § I. IV.

[m] Ibid. § XI.

him to make uſe of force to ſupport it, when any oppoſite force would otherwiſe hinder it from taking place in fact, and will not vacate the right merely becauſe it is thus ſupported. But we certainly may ſay, that no ſuch right can ariſe out of mere conqueſt. Though the law of nature allows either ſtates or individuals to bring their rights into execution by force, when they cannot be brought into execution by any other means; yet this law does not produce any right out of mere force, though it happens to be ſuperiour to the force, which is oppoſed to it.

But where a war is juſt on the part of the conqueror, he has a right to require reparation of damages; and he has a farther right to puniſh the nation, that did the injury, which occaſioned the war, if this injury proceeded from any public malice or hurtful diſpoſition. And though mere conqueſt could give him no right of civil dominion over the vanquiſhed nation, yet it may ſtill be a queſtion, whether ſuch a right will not ariſe out of his right to obtain reparation and to inflict puniſhment.

There is but little uſe to be made of ſome of the principal topics, from which Mr. Lock argues in this queſtion. [n] He contends, that thoſe members of a ſtate, who do not actually concur in the wrong, which is done by the governours of it, are neither liable to puniſhment, nor obliged to make reparation of damages; but that the puniſhment and the reparation ought of right to be confined to the governours, and to their direct and immediate aſſiſtants or abettors. As far as the members of a ſociety are to be puniſhed individually, we muſt neceſſarily grant, that this opinion is

[n] V. II. p. 226.

true.

true. [n] But in reſpect of any puniſhment, which is inflicted upon the body of the ſtate, and affects the individual members no otherwiſe, than as they are parts of this body, and eſpecially in reſpect of the obligation to repare damages, the law of nations looks upon all the members of it as acceſſories to the acts of their conſtitutional governours, and as abettors of their injuſtice.

Mr. [o] Lock contends farther, "that even thoſe members of a ſtate, who have directly concurred in the wrongs done by the civil governours of it, cannot forfeit the full property of their lands or other goods, either in the way of puniſhment, or in the way of reparation of damages: becauſe nature, which willeth as much as may be the preſervation of children, has given their children a right to their land or other goods." But the law of nature, as we have ſeen in another [p] place, knows nothing of any ſuch indefeaſible right in children to inherit the lands or other goods of their parents. Or even if we were to ſuppoſe, that the law of nature has eſtabliſhed a right of inheritance, yet as long as the parent lives, the children can have only an expectancy of ſucceeding to his goods, whether thoſe goods are moveable or immoveable: becauſe a right of inheritance is only a right of the heir to take ſuch goods, as the anceſtor leaves behind him at his death. Since the parent therefore will leave no goods behind him, if he has been juſtly diſſeized of them in his life-time, the childs right of inheritance will fail, that is, it will have no right to inherit any thing. Thus the childs right of inheritance can never be urged to prove that the parent cannot juſtly be diſſeized of his

[n] See B. II. C. IX. § XIII. [o] V. II. p. 226. [p] See B. I. C. VII. § IV.

goods,

goods, becauſe we muſt firſt prove, that the parent cannot be ſo diſſeized, before we can eſtabliſh the childs right of inheritance.

But as no uſe can be made of theſe principles, ſo we have no occaſion to uſe them, in ſhewing, that a conquerors demand to have his damages repared, will not be ſufficient to give him civil dominion over the vanquiſhed ſtate without the conſent of the people. The damages muſt be unuſually great, if the vanquiſhed ſtate is not able to ſatisfy the conquerors juſt demands in money, or in moveable goods, or in both together. And if it is able to make him reparation by ſuch payments as theſe, he has no farther claim to any property in the lands of its members, and much leſs to any right over their perſons.

Mr. [q] Lock indeed maintains, not only that the damages of an unjuſt war, will ſeldom be high enough to give the conqueror any demand upon the land of the vanquiſhed people, but that it is impoſſible for his juſt demands to amount to the value of all their land. The calculation has ſomething very extraordinary in it, which makes it deſerve the readers notice. This writer ſets the whole amount of the damage, that can poſſibly have been ſuſtained by the conquering nation, at five years product of its land. For a war ſeldom continues longer than five years, and if it ſhould have continued longer, we cannot ſuppoſe the enemy to have deſtroyed the whole product of the land every year. But there are two general articles left out of this account in the firſt inſtance. A juſt war is ſometimes made to obtain reparation of damages, that have been done by the enemy before the war began: and theſe

[q] V. II. p. 228.

damages

damages are to be repared, as well as the damages, which the ſame enemy does by deſtroying the yearly product of the conquerors lands, during the courſe of the war. And from whatever other juſt cauſe the war might begin on the part of the conqueror, he has a right to reparation, not only for the damages, which he ſuffers, but likewiſe for the expences, that he makes in it. Beſides theſe two general articles Mr. Lock has omitted numberleſs particular articles in this account, which are included in the damages, that are frequently done in war. When Athens was deſtroyed by the perſians, Rome by the gauls, or Corinth by the romans; the loſs of five years product of the lands of the inhabitants would have born a very ſmall proportion to the loſs, which theſe ſtates had ſuſtained. Small ſtates conſiſt of little more than one capital city; and the damage, that is done to the ſtate by demoliſhing this one city, is almoſt irreparable. And when we are calculating the poſſible damages of a public war, in order to ſee what effects of right theſe damages may produce, we are to conſider not merely what is likely to happen to ſuch large ſocieties, as mankind are commonly united into at preſent, but what might poſſibly happen either in theſe, or in ſuch ſmall ſtates, as ſubſiſted formerly, and as may ſubſiſt again. [r] Mr. Lock eſtimates the loſs of money or other treaſure of the like ſort at nothing; for the value of them, he ſays, is fantaſtical and imaginary, nature has put no value upon them, and conſequently they are of no account by natures ſtandard. It muſt be confeſſed here on the one hand, that the value of money is imaginary; and yet it would be contrary to the common

[r] Vol. II. p. 228.

ſenſe

ſenſe of mankind, to affirm on the other hand, that the law of nature would not charge us with doing any damage to a nation, if we ſhould rob its mint or its treaſury, becauſe the value of money is imaginary. All the value that any thing can have, muſt be imaginary, when the thing itſelf is in its own nature of little or no real uſe. The value therefore of money, conſidered merely as metal, is imaginary; becauſe little or no real uſe can be made of this metal. But if we would determine whether it is to be reckoned of any value, when eſtimated by natures ſtandard, we muſt conſider, not only whether it has any real uſe in itſelf, but likewiſe whether it has any real uſe at all. For the law of nature, as it relates to mankind, ſets a value upon whatever is of real uſe to the owner; whether its uſes are derived from the nature of the thing itſelf, or from the labour of mankind, or from their general conſent, or from any other accident. A tranſparent ſtone or a maſs of yellow metal, are not fitted by nature to anſwer any beneficial purpoſes: thus far therefore they are worth nothing in natures account. If the owner ſhould be led by his own fancy to value either of them at the rate of twenty oxen, or of eighty quarters of wheat, this would be only an imaginary value; and the law of nature would take no notice of it, as long as this fancy was peculiar to himſelf, and no one elſe was led by the like fancy to rate them at the ſame value with him, or at any value all: if he keeps the ſtone or the metal, they will be of no uſe to him; and if he is diſpoſed to part with them, no body will give him any thing for them, that will afford him any real benefit. But if mankind in general have the ſame fancy, that he has, and are led by it to rate the ſtone or the metal as high as

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he rates them, the value of them, though it is ſtill imaginary in its origin, becomes real, in the application of them to the purpoſes of human life, by this accident of its being general. The jewell or the gold, if he keeps them, will do nothing towards anſwering the calls of nature; but if he is diſpoſed to part with them, the value, which mankind have agreed to ſet upon them, will enable him at any time to procure a dwelling, food, clothing, phyſic, and whatever elſe he wants, in exchange for them. Beſides the loſs of money or other treaſure of the like ſort a nation may ſuffer much more damage in war, than the deſtruction of the bare product of its lands for as many years, as the war continues. Goods, that have been manufactured, are of much more value, than the ſimple materials, out of which they were made. If the enemy has deſtroyed woollen or linnen cloth; we ſhould not eſtimate the damages done according to natures ſtandard, if we were to ſet them no higher than the original value of the wool or the flax, that was uſed in making the cloth. For nature in theſe and in other inſtances ſets a price upon the labour of the manufacturer: and the value of his labour is in moſt inſtances vaſtly greater, than the value of the original materials, as they came out of the hands of nature. Wool indeed is the immediate product of the live ſtock of the landholders, and not of the land itſelf. But Mr. Lock has omitted this whole article of live ſtock in his account: for certainly the damage, that is done in war to the oxen, horſes, ſheep, or other animals belonging to the members of a ſtate, is not included in the damage, that is done to the yearly product of their land. Amongſt other goods, that are of more value, than the materials, out of which they

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are made, we may reckon ſhips of all ſorts and naval ſtores, houſhold furniture, inſtruments of huſbandry, and the tools and other neceſſary utenſils of manufacturers and artificers. When timber, that was growing, is deſtroyed in war; the damage, that is done, does not come under the notion of a loſs of the yearly product of the land: timber is indeed the product of land, but not the yearly product of it: a war of one year may waſte the product of twenty or of forty years in timber. The plundering of a city, even though the buildings are not deſtroyed, will occaſion a farther damage to the ſtate, than the mere loſs of goods: the labour of its manufacturers will be ſtopped; and more than five years time may be neceſſary to bring them together again, and to ſupply them with materials and inſtruments for working. Add to all theſe the immediate damage, that is done to a ſtate by putting a ſtop to its foreign trade, and the conſequent damage, that it will ſuffer, if the trade, in which it was engaged, ſhould in the mean time take a different courſe and the ſtate ſhould wholly loſe it. After Mr. Lock has thus ſet the damages of war too low, he goes on to ſet the value of land as much too high. He rates the value of land at an hundred times the value of one years product: and conſequently, if one years product is worth three rents of the land, the land itſelf muſt be worth three hundred years purchaſe. Nay, what is ſtill more extraordinary, this is the value, that he ſets upon the reverſion of land: for he does not apply this calculation to ſhew, that the preſent poſſeſſors of the land cannot be diſſeized of it for damages done; but that the poſterity of the wrong-doers cannot be hindered from re-entering upon it at the death of their parents.

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Though it is very unlikely, that a nation, which is victorious in the end of a war, ſhould have ſuffered all theſe damages, in the courſe of it; yet certainly there is a poſſibility of its ſuffering ſo many of them, as may make the demand of reparation fall very little ſhort of the value of the enemy's land. But ſuppoſe the value of the damages to be equal to the value of the land of the conquered people; yet the conquerors demand would give him no immediate right to civil dominion. The ſtate, that he has ſubdued, is at liberty to transfer its land to other purchaſers; and if it can raiſe money enough by this means to pay for the damages, that it has done, the demand of the conqueror is at an end. Or if he ſhould ſeize upon the land for the reparation of damages done; the conquered people are not obliged to ſtay upon it and to ſubmit themſelves to his will: they may either continue united and ſeek a new habitation; or they may diſperſe by mutual conſent, and become members of any other ſocieties, that are willing to receive them. The diſtreſs of a ſtate, that has done any great damages, and is compelled by conqueſt to repare them, may make it more eligible for the people to receive the conqueror for their civil governour, than to try any other expedients; even though the demand of the conqueror for theſe damages ſhould not amount to the value of their lands. [a] Such a conſent of the people, though they are driven to it by diſtreſs, would be binding upon them: for it is not a conſent that is extorted by unjuſt force: the conqueror was doing only what he had a right to do; and a conſent, which follows from the uſe of force, if the force was juſt, is binding. Thus conqueſt in a juſt war may be

[a] See B. I. C. VI. § XVI.

the remote occaſion of acquiring civil dominion; but the immediate cauſe of it is the conſent of the people.

If we carry the conquerors juſt demand of reparation farther than this, and ſuppoſe, what is next to impoſſible, that it amounts not only to the value of the land, but likewiſe to the value of the perſonal ſervice of the ſeveral members of the ſtate; ſuch a demand might give him private deſpotiſm over the individuals: but this right of the conqueror inſtead of producing civil dominion would put an end to the ſtate: the ſeveral members of it will thus become a family of ſlaves, but the collective body will not be a civil ſociety. To change this family of ſlaves into a ſtate, the conqueror muſt manumiſe them, and they muſt conſent both to form themſelves into a civil ſociety, and likewiſe to accept of the terms, which he offers them, when they are thus united, of allowing him to have civil power over them, in return for the perſonal liberty, which he grants them.

The puniſhment of a ſtate, like the puniſhment of an individual, conſiſts in inflicting ſome evil upon it in order either to correct a diſpoſition of doing harm, which has appeared from the harm, that it has already done, or to prevent the ſame diſpoſition from breaking out again in doing the like harm. Amongſt the ſeveral ways of puniſhing a ſtate, [t] Grotius, as we have already hinted, mentions the diſſolution of it. And there ſeems to be no room to doubt, but that a ſociety of men, who were united for better purpoſes, may poſſibly have ſhewn by their conduct, that, as long as they continue to act with a joynt force, other ſtates can have no effectual ſecurity againſt the harm, which they are

[t] Grot. L. II. C. XXI. § VII. See C. IX. § XIII.

likely

likely to ſuffer from the evil diſpoſition of the individuals, who compoſe that ſociety. If ſuch a caſe as this ſhould ever happen, we cannot reaſonably doubt about the natural right of mankind in general, and of the neighbouring ſtates in particular, who have been more immediately injured, to diſſolve the union, from which they have ſuffered harm already, and are likely, if it continues, to ſuffer more. Or rather the ſocial compact will be diſſolved in right; when the ſtate is thus become a band of robbers: and we cannot reaſonably queſtion, whether the law of nature will allow other ſtates to diſſolve a compact in fact, which the ſame law has before diſſolved in right. By ſuch a puniſhment as this the conqueror, inſtead of acquiring civil dominion over the ſtate, puts an end to the exiſtence of it. But if the individuals, who were the members of the ſtate before it was diſſolved, continue to live near one another; they will have the ſame opportunity of acting together, after the diſſolution of the ſtate, that they had before. There is therefore no way of diſſolving a ſtate effectually without inflicting ſome puniſhment upon the individual members. [v] But no puniſhment can juſtly be inflicted upon each of the members individually without diſtinction, unleſs all and each have actually aſſiſted, or have directly and immediately concurred, in the general crime of the ſociety: the conſent, which they have remotely and indirectly given to the acts of the public in the ſocial compact, though it obliges all and each of them to repare the damages, that the ſociety does, will only make the whole body collectively and not the ſeveral members individually liable to puniſhment. The guilty mem-

[v] See C. IX. § XIII.

bers may however be deprived of their lands; [w] and though the general property of these lands, if the society subsisted, would be vested in the society, when the individual proprietors thus lose them, so that the conqueror could not justly seize them and make them his own by occupancy; yet this general claim of the society to all the lands of its territory, that have no private owners, ceases, when the society is dissolved: the conquering nation therefore may acquire property by occupancy in the lands, of which the guilty members are thus deprived, and may grant these lands to new inhabitants, to colonies of husbandmen, manufacturers, and artificers, or to the army, which it employed in making the conquest. But no sovereign power over the state, that was dissolved, or over the innocent members of it, is acquired by this means. Though the remaining inhabitants of the conquered country should incorporate into a civil society with the new colony, this union is made by consent; and neither the leader of the conquering army nor any one else can acquire civil power over this new society without a farther act of consent.

[x] Grotius says indeed, that a vanquished nation, which has deserved such a punishment, may be made a province to the nation, that has subdued it. But our author should have shewn, how a nation can consistently with the nature of a civil society be reduced to the condition of a province without its own consent. The weak condition, that it has brought itself into by supporting an unjust war, the distresses, that arise from being compelled to make reparation of damages to the conqueror,

[w] See B. II. C. III. § XIV. [x] See L. II. C. XXI. § VII. see C. IX. § XIII.

and

and from being farther compelled, in the way of punishment, to dismantle its towns, or to give up its public treasure, or its arms, or its ships of war, may induce the people to consent to become a province of the conquering nation: but without their consent the conqueror has no right to make the vanquished state a province; because he has no right to compel the people to abide by their social compact, and to continue united in one body. It will indeed be a bad alternative, when the people must chuse either to become a province, or to dissolve their state by mutual consent. But as they will always be at liberty to chuse the latter part of the alternative, the conqueror can never acquire any right over them as a collective body of men without their own consent.

[y] Upon the whole, though private despotism may arise immediately out of damage done or out of punishment inflicted, without the consent of the individual, who is brought into a state of slavery; yet civil despotism or sovereign power over a state cannot be produced by the same causes without the consent of the collective body of the state. For the several parts or members of a state, are kept together only by a compact, in which none besides themselves are parties. And since a right to obtain reparation, where a state has done damage, or to inflict punishment, where it has committed a crime, does not make the person, who has this right, whether it is an individual person or the collective person of another state, a party in that compact; his right to obtain reparation or to inflict punishment cannot produce a right to insist, that this compact shall be observed, and that the members of

[y] See B. I. C. XX. §IV.

such

ſuch an artificial body ſhall continue to be united. They are at liberty, notwithſtanding his right, to releaſe one another from their ſocial compact by mutual conſent: and when they have ſo releaſed one another the notion of civil deſpotiſm becomes unintelligible; becauſe the ſtate will then have ceaſed to exiſt.

THE END.